IN THE

United States Circuit Court of Appeals

For The Ninth Circuit

CLEVE W. VAN DYKE,
Appellant.

vs.

BASCOM PARKER,
Appellee.

No. 7879

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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This is an appeal from a judgment at law (Tr. 115-117) rendered on the 22nd day of November, 1934, by the United States District Court of Arizona, sitting without a jury.

NATURE OF THE CASE

Complaint was filed on the 21st day of January, 1931 (Tr. 1-7) by appellee against appellant and one Hoval A. Smith, on two promissory notes executed by them at Chicago, Illinois, on October 30, 1917, in favor of the appellee, each note being for the sum of $5,000.00 and becoming due on December 30, 1918 and June 30, 1919, respectively. The complaint purported to state a separate cause of action on each note.

A demurrer to the complaint was filed by the defendants setting up that the complaint did not state sufficient facts to constitute a cause of action and setting up the four year statute of limitations of Arizona, Sec. 2061, Revised Code of Arizona, 1928, since the instruments were executed outside of the state (Tr. 7-9), and said demurrer was sustained on the 27th day of April, 1931. (Tr. 9-10).

On the 26th day of August, 1931, plaintiff filed his second amended complaint, (Tr. 10-23) containing the same allegations as in the original complaint, but adding thereto in his first cause of action, the following:

> "That thereafter, and on or about the 1st day of January, 1927, the defendant, Cleve W. Van Dyke, acknowledged the justness of the claim of the plaintiff upon said promissory note in a writing signed by him" (Par. IV., Tr. 12).

and plaintiff set forth in haec verba the instrument that he replied upon to toll the statute of limitations (Tr. 12-17, Par. V) which was a copy of a letter dated January 1, 1927, addressed to Mr. Hoval A. Smith,

and set forth further that the notes referred to in said letter were the notes referred to in the complaint (Tr. 17-18, Par VI.) Plaintiff further alleged that each of the defendants were without the limits of the State of Arizona for twelve and ten months respectively subsequent to the accrual of the cause of action. (Tr. 18, Par. VII).

In his second cause of action, plaintiff added that paragraph IV, V, VI and VII of the first cause of action were repeated and realleged to the same force and effect as if set forth therein verbatim (Tr. 21, Par. IV, V, VI).

Defendants demurred to the second amended complaint, setting up that the complaint did not state sufficient facts to constitute a cause of action against defendants, and pleading Section 2061, Subd. 3, Revised Code of Arizona, 1928 (Tr. 23-26), and on the 17th day of June, 1932, the United States District Court sustained the demurrer as to defendant Hoval A. Smith, and overruled it as to appellant-defendant, saving exceptions to him, and filed its written opinion in which it gave as its reason therefor that the notes were payable in Iowa and governed by the laws of that state (Tr. 27-37).

After various motions and rulings, defendant-appellant filed an amended answer setting up, among other defenses, the said Arizona statute of limitations (Tr. 46-51). To this answer plaintiff filed a reply (Tr. 51-52).

The cause came on for trial at Tucson, Arizona, before Honorable Albert M. Sames sitting as judge

of said court, without a jury, a jury having been waived in writing (Tr. 53).

At the close of plaintiff's testimony, defendant-appellant made a motion for judgment in his favor upon the ground that there was no evidence in the record to sustain a judgment for the plaintiff (Tr. 210), and at the close of all the evidence in the case, defendant-appellant renewed said motion for judgment upon the same grounds (Tr. 217).

The court took each of these motions under consideration and on September 15, 1934, made its order denying same, and ordered that an exception be entered on behalf of defendant-appellant (Tr. 58).

In compliance with the order of the court, plaintiff filed his proposed special findings of fact and conclusions of law on October 2, 1934 (Tr. 59-72). Time therefor having been extended, on the 18th day of October, 1934, defendant-appellant filed his objections thereto (Tr. 74-90) and proposed certain findings of fact and conclusions of law (Tr. 90-96), and at the same time filed a motion to set aside the preliminary order and enter judgment for said defendant (Tr. 97).

Upon the hearing thereof, the court on November 10, 1934, denied defendant's motion to set aside the preliminary order for judgment and enter judgment for the defendant, (Tr. 98-99) ; overruled defendant's objections to plaintiff's proposed findings of fact and conclusions of law and defendant's proposed findings of fact and conclusions of law, (Tr. 98-99) ; and allowed plaintiff's proposed special findings of fact,

subject to the following exceptions and amendments:

> "That the words 'and expressed a willingness to pay the same' in special finding No. 5 be stricken;
> "That the words 'executed at Miami, Arizona' be inserted in line four of special finding No. 5, following the word 'instrument' in said line four;
> "That the following conclusions be added: 'That the instrument in writing executed at Miami, Arizona, on the 1st day of January, 1927, is a sufficient acknowledgment under Section 2068, Revised Statutes of Arizona, 1928, to take the cause of action on said notes out of the Arizona Statute of Limitations'; and 'That the memorandum in writing executed at Miami, Arizona, on the 1st day of January, 1927, is a sufficient admission in writing signed by the party to be charged that the debt is unpaid, under Section 11018, Code of Iowa, 1927, to revive the cause of action on said notes'." (Tr. 100).

Exceptions were entered on behalf of defendant-appellant to each of said special findings and rulings (Tr. 100).

Subsequently, and within the time allowed by the court, counsel for appellee prepared his special findings of fact and conclusions of law, and the same were signed and filed by the trial judge on November 22, 1934, (Tr. 101-114) and on the same date, the Honorable Albert M. Sames, Judge of the United States District Court, signed and filed the judgment in favor of the paintiff-appellee, from which this appeal is taken. (Tr. 115-117).

Thereafter and within the time allowed by law,

and within the term of the court at which the cause was tried, appellant filed his motion to set aside the judgment, and to grant him a new trial, (Tr. 117-125), which motion was duly served within the term as required by the rules of court. A hearing on said motion was had on December 20, 1934, and at the close of the argument, the court took the same under advisement and plaintiff and defendant were allowed time in which to file their authorities. (Tr. 130). On the 12th day of February, 1935, the motion of appellant for new trial was denied, and an exception entered on his behalf. (Tr. 131).

Various stipulations for extensions of time for the preparation of bill of exceptions were made, and orders extending the term of court for the settlement and allowance of same were made (Tr. 131-135) all of which orders are duly preserved in appellant's bill of exceptions and the Court has so certified in its certificate attached to said bill of exceptions.

Within the time allowed by law, appellant filed his petition for appeal, accompanied by Assignments of Error, and procured the order allowing the appeal and settling the bill of exceptions; all of these matters likewise appearing in the bill of exceptions.

Rule No. 37 of the United States District Court provides:

> "Motions for new trial and petitions for rehearing shall in all cases be made and filed and a copy thereof served on the attorney or solicitor for the adverse party within 15 days after the entry of judgment or decree.
>
> * * * *

"A motion for new trial or petition for rehearing served and filed under this rule shall be deemed to be entertained by the court and shall suspend the operation of the judgment or decree and of any and all process that may have been issued thereon, and of any appeal which may have been granted, and thereafter no appeal will be granted from said judgment or decree or any process issued for the enforcement thereof, until final disposition of said motion or petition."

STATEMENT OF FACTS

On October 30, 1917, Bascom Parker, appellee herein, accepted, in addition to bonds and cash, three promissory notes of $5,000.00 each in payment of stock in the Calhoun Timber Company of Calhoun County, Florida, (Tr. 215) one of the promotions of appellee (Tr. 194), which stock he had sold to Cleve W. Van Dyke, appellant herein, Hoval A. Smith, one of the defendants below, and R. C. Lubiens (Tr. 147, 215), each of whom were to pay their pro rata share of the purchase price (Tr. 13, 194). These notes were drawn in that way so that each one could pay their pro rata share of the payment in that way. (Tr. 194). All of the notes were signed by Cleve W. Van Dyke and Hoval A. Smith, but not by R. C. Lubiens (Tr. 194 and 147).

Appellee discounted the first note with the Exchange Bank in Palatka, Florida (Tr. 147) and when it became due it was sent to appellant who paid it (Tr. 147, 194).

The two other notes, which are the subject matter

of this suit, were made and executed on October 30, 1917, at Chicago, Illinois, and were payable to appellee at the St. Ansgar Bank of Brush, Lubiens and Annis at St. Ansgar, Iowa, one of said notes becoming due on December 30, 1918, and the other on June 30, 1919 (Tr. 3, 5).

Appellee pledged these two notes to the said St. Ansgar Bank as security for a loan from that bank to him. (Tr. 14, 147). The bank held these notes for more than a year (Tr. 157). Appellee received them back from the bank (Tr. 147, 157), but the date upon which they were returned does not appear in the testimony.

After the notes were taken over by the St. Ansgar Bank, through Lubiens, they were sent to the Gila Valley Bank at Miami, Arizona, for collection by the St. Ansgar Bank, but appellant refused to pay the same and based his refusal upon the ground that he did not owe the money, that the stock had been turned over to Lubiens, that Lubiens owed the money for the amount due, and that appellant had paid his share in full. The notes were dishonored and returned to the St. Ansgar Bank from the Gila Valley Bank of Miami. (Tr. 104-105).

During the time that the notes were in the possession of the St. Ansgar Bank as pledgee, appellant and his co-defendant, Hoval A. Smith, made a settlement with the bank, in which settlement the notes in question were included (Tr. 190). This settlement with the St. Ansgar Bank was made in order to avoid litigation (Tr. 15), and Hoval Smith and appellant agreed to the settlement with the understanding that

all notes and obligations were included therein. (Tr. 64). After the settlement was made with the said bank, appellant and his co-defendant owed the bank $10,000.00 (Tr. 16).

On January 1, 1927, more than seven years after the notes were due, appellee called on appellant at his office in Miami, Arizona, with regard to the notes (Tr. 174, 176). No notice of any claim that these notes were unpaid had been given to appellant until this call (Tr. 64). Appellant then drafted a letter to Hoval A. Smith, advising him of the situation, this letter being the instrument relied upon by appellee to toll the statutes and which was set up in haec verba in his second amended complaint (Tr. 12-17). The letter was dictated in the presence of appellee (Tr. 176), and a carbon copy thereof handed to him (Tr.175).

At the bottom of said letter after the words "Yours very truly," a blank space was left for signature, under which the name "Cleve W. Van Dyke" was typewritten by the stenographer. The photostatic copy thereof showing the blank space left for the signature appears in Plaintiff's Exhibit No. 4 (Tr. 232-235). Neither the tentative letter, nor the carbon copy thereof, was signed by appellant (Tr. 191), nor did he dictate his signature to the stenographer (Tr. 191, 197), nor did he authorize his stenographer to sign either the original or carbon (Tr. 199).

The evidence does not show that the instrument was read by either party at the time it was handed to appellee. The letter was never mailed (Tr. 191, 197), but instead a telegram was sent by appellant to Hoval

A. Smith (Tr. 198), to meet the appellee in Chicago and stop at the St. Ansgar Bank and present the matter to Mr. Salisbury of the St. Ansgar Bank (Tr. 16).

In his tentative draft of letter, which was dictated in appellee's presence, appellant stated that he was writing to inform Hoval A. Smith of the situation, and to fulfill a statement that he had made to appellee that he and Hoval Smith would not pay the note for $10,000.00 which they owed the bank, until that bank settled with appellee for his notes, which had been included in the compromise settlement with the bank (Tr. 16) and which were part of the consideration upon which the settlement with the St. Ansgar Bank was made; and he requested Hoval Smith upon his return to Arizona to stop at St. Ansgar and present the matter to Mr. Salisbury of the St. Ansgar Bank. (Tr. 16). He stated that Mr. Parker would have levied upon the payment that they were about to make to the Bank of St. Ansgar had he not stipulated that they would not make the payment to the bank until appellee's matter was adjusted.

He refers to his refusal of the payment of the notes when they were presented to him by the Gila Valley Bank of Miami for payment and their return to the St. Ansgar Bank, stating that his refusal was based upon the ground that he "did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid my share in full," (Tr. 14) and that he had later paid a further sum of $10,000 which was the original cash paid to Mr. Parker. He also refers to

his reasons for making the compromise settlement with the Bank, which included these notes, was that his health was poor, that Hoval Smith's affairs were involved, that times were hard, and they felt that they had better make an amicable settlement rather than seek their dues in court (Tr. 17). He stated he did not owe the money and that he had a good defense against the bank (Tr. 15); that neither he nor the Calhoun Timber Company had received any consideration for the notes (Tr. 14), and that the whole matter was a fraud and that the bank could not hold him for any amount (Tr. 15).

This letter gave the substance of the situation with regard to the notes as it then existed. The writing was dictated to the stenographer by appellant in the presence of appellee who saw it written and received a carbon copy thereof at that time (Tr. 175), and the letter was dictated just as appellee knew the transaction to be and he heard the entire letter dictated (Tr. 189).

Appellee never questioned the truth of these statements in the letter, nor corrected the same.

Appellee's testimony as to the conversation that took place between appellee and the appellant at the time is as follows:

> "Q. What was said about him writing this letter, if anything by him to you, before writing it?" (Tr. 176).
>
> "A. Why, he had told me that he supposed these notes were paid just the same as he did in that letter. He says 'Parker, I settled with the St. Ansgar Bank, Hoval Smith and I; Hoval trans-

> acted the deal, and all notes would be cleaned up,' and he says 'I understood that those notes were cleaned up; that the bank still had them.' 'Well,' I says, 'you see they don't have them,' so then after talking over our affairs, then he called up Hoval and got Mrs. Smith and found Hoval was out, and then he dictated that letter to get it off to Hoval, and Mr. Van Dyke agreed with me he would not pay any of those notes at the St. Ansgar Bank until they took up my two notes." (Tr. 177).

Subsequent to this transaction, about April, 1927, appellant and appellee had a conversation in California, (Tr. 193), as a result of which appellant sent appellee four checks of five hundred dollars each, which he claims was in settlement of such disputed liability (Tr. 193) but which appellee denies.

Appellee made no further demand for the payment of these notes for some three and a half years thereafter, at which time this action was brought.

The original notes were never introduced into evidence, the claim being made that they were lost (Tr. 141). There was testimony that they were sent to Mr. Foster, the attorney for appellee, (Tr. 149), who died while the action was pending. His surviving wife did not testify, although it appeared that all of his papers passed into her possession upon his death. (Tr. 165, 166).

The copies of the notes as set up in the complaint do not show that they bore any endorsements whatsoever, except as to payments; nor was there any allegation or testimony to the effect that they had

been transferred to appellee by the St. Ansgar Bank by endorsement.

The original of the writing dated January 1, 1927, was not introduced in evidence. What was introduced was a carbon copy thereof, plaintiff's Exhibit No. 4, appearing in the record at pages 182-184, and this was offered as an original instrument. (Tr. 178).

SPECIFICATIONS OF ERROR

SPECIFICATION OF ERROR NO. I

(Assignment of Error No. I, Tr. 228-229)

The Court erred in overruling the demurrer of the defendant-appellant to the first cause of action set up in the first and second amended complaint of the plaintiff filed herein, for the reason that it appears therein that said cause of action accrued on the 30th day of December, 1918, upon the maturing of the promissory note set up in said first amended and second amended complaints, which said promissory note being a written instrument made and payable without the State of Arizona, and said action being commenced and prosecuted more than four years after this cause of action accrued upon a written instrument executed without the State of Arizona; and the said cause of action so appearing in said pleading being barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which provides that such actions shall be commenced within four years after the cause of action shall have accrued and not afterwards; and the laws of Arizona and the decision

of the Supreme Court of the State of Arizona further providing that the defense of the statute of limitations may be set up by demurrer, and when so set up defendant is entitled to judgment in his favor.

SPECIFICATION OF ERROR NO. II

(Assignment of Error No. II, Tr. 229-230)

The Court erred in overruling the demurrer of the defendant appellant to the second cause of action set up in the first and second amended complaint of the plaintiff filed herein, for the reason that it appears therein that said cause of action accrued on the 30th day of June, 1919, upon the maturing of the promissory note set up in said first amended and second amended complaints, which said promissory note being a written instrument made and payable without the State of Arizona, and said action being commenced and prosecuted more than four years after this cause of action accrued upon a written instrument executed without the State of Arizona; and the said cause of action so appearing in said pleading being barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which provides that such actions shall be commenced within four years after the cause of action shall have accrued and not afterwards; and the laws of Arizona and the decision of the Supreme Court of the State of Arizona further providing that the defense of the statute of limitations may be set up by demurrer, and when so set up defendant is entitled to judgment in his favor.

SPECIFICATION OF ERROR NO. III

(Assignment of Error No. III, Tr. 230-231)

That the Court erred in denying the motion of defendant appellant, defendant appellant having excepted to the denial of said motion, made at the conclusion of the plaintiff's case, for judgment in behalf of the defendant, made upon the ground that there was no sufficient, substantial or competent evidence to sustain a judgment for the plaintiff in the case nor any evidence to sustain a judgment for the plaintiff in the case, and that defendant was entitled to judgment in his favor for the reason that the uncontracticted evidence showed that any cause of action that the plaintiff might have had against the defendant was barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which defense was set up by the defendant appellant, both in his demurrers and in his answer to the merits of plaintiff's complaint; and for the further reason that there was no evidence to show that the plaintiff was the owner and holder of the notes sued on in the plaintiff's first amended and second amended complaint at the time the action was brought, or at the time that the judgment was rendered herein. Said motion being upon the specific grounds that the Court should find for the defendant upon all of the facts for the reason that plaintiff has wholly failed to establish his cause of action, and wholly failed to prove that the cause of action is not barred by the statute of limitations of the State of

Arizona pleaded in the demurrer and answer of the defendant appellant, and has wholly failed to prove that the defendant ever signed any instrument in writing acknowledging the justness of the debt or promised to pay the same at any time since the date of the note.

SPECIFICATION OF ERROR NO. IV

(Assignment of Error No. IV, Tr. 231-232)

That the Court erred in denying the motion of defendant appellant, defendant appellant having excepted to the denial of said motion, made at the close of the testimony of the case for judgment in behalf of defendant, made upon the ground that there was no sufficient, substantial or competent evidence to sustain a judgment for the plaintiff in the case nor any evidence to sustain a judgment for the plaintiff in the case, and that defendant was entitled to judgment in his favor for the reason that the uncontradicted evidence showed that any cause of action that the plaintiff might have had against the defendant was barred by the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061 of the 1928 Civil Code of Arizona, which defense was set up by the defendant appellant, both in his demurrers and in his answer to the merits of plaintiff's complaint; and for the further reason that there was no evidence to show that the plaintiff was the owner and holder of the notes sued on in the plaintiff's first amended and second complaint at the time the action was brought, or at the time that the judgment was

rendered herein. Said motion being upon the specific grounds that the Court should find for the defendant upon all of the facts for the reason that plaintiff has wholly failed to establish his cause of action, and wholly failed to prove that the cause of action is not barred by the statute of limitations of the State of Arizona pleaded in the demurrer and answer of the defendant appellant, and has wholly failed to prove that the defendant ever signed any instrument in writing acknowledging the justness of the debt or promised to pay the same at any time since the date of the note.

SPECIFICATION OF ERROR NO. V

(Assignment of Error No. V, Tr. 232-237)

That the Court erred in admitting in evidence in behalf of the plaintiff-appellee, plaintiff's Exhibit Number 4 over the objection and exception of the defendant, a photostatic copy of said exhibit appearing on pages 233 to 235 of the Transcript, and is in words and figures as follows:

"January 1, 1927.

Mr. Hoval A. Smith,
Care Senator Ralph H. Cameron,
Senate Office Building,
Washington, D. C.

My dear Hoval:

Mr. Bascom Parker, of Niles, Michigan, arrived in Miami a few days ago asking the settlement of two notes of $5,000 each, given to him in Chicago August 30, 1917, in payment for his stock in the

Calhoun Timber Company. You will recall the deal.

This stock was purchased for the remaining stockholders of the company at the request of Mr. H. C. Olcott, acting for the trustees of the bondholders of the Calhoun Timber Company. The amount to be paid for this stock was $50,000; $25,000 of which was to be in Calhoun Timber Company bonds which were owned by the Calhoun Timber Company, and $10,000 in cash, and $15,000 in three $5,000 notes. These notes were to be the joint obligation of yourself, Mr. Lubiens and myself. The cash paid to Mr. Parker was a check against the $100,000 fund in the St. Ansgar Bank which we had borrowed from Thomas F. Cole, of New York. These notes were to have been paid when due. One of them came due in the following June and was sent out to me to Miami for collection. I paid this note. The two other notes have never been paid and form the basis of a demand on the part of Mr. Parker for payment at this time.

The stock was delivered and was transferred on the books of the company. One third of the stock was delivered to yourself, one third to R. C. Lubiens, and one third to myself. After the company became defunct the $100,000 owed to Thomas F. Cole became due and as you know I have paid this sum, so that puts me now in the position of having paid $15,000 of the $25,000 that was owing to Mr. Parker. After the first note was paid the other two notes were taken

over by the St. Ansgar Bank, through Lubiens. Later on one of them was sent to me for collection by the St. Ansgar Bank. I refused to pay the same at the time because I had already paid the share due from me and later I paid a further sum of $10,000 which was the original cash paid to Mr. Parker.

The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money for the amount due, as I had paid my share in full.

Hoval A. Smith,
January 1, 1927
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Later on there were some differences between the St. Ansgar Bank on this Calhoun Timber Company matter and yourself and myself. Mr. Lubiens, who was the treasurer of the company, and who was mutually trusted by us at the time, had gathered together a lot of notes which he had placed in the bank and which had been signed by us at various times, and for which we had received no consideration and for which the Calhoun Timber Company had received no consideration. In my opinion at the time this matter was brought to my attention by you and by Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount.

Time went on and at your insistence an agreement was reached between ourselves and the St. Ansgar Bank. In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included within this settlement. No notice has ever been received by me from the Bank of St. Ansgar or Mr. Lubiens that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and the bank, having been notified by me that it was their obligation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arrival of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment.

Now, Hoval, I have tried to be patient in this matter, I have tried to be fair; I have assumed more than my share of the obligation of this disasterous enterprise; I have carried the load for you; I have carried the load for the bank and have paid out practically all the cash money that has been paid out since the final crash of the company. I have secured not one nickle or one dime in salvage from the company and I have even gone so far as to pay the $100,000 to Mr. Cole

which was a joint obligation of yourself, the bank and myself.

I presumed the bank was trying to adjust this thing fairly and on a basis of equity and trying to clear up a nasty mess. When Mr. Parker arrived I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that

Hoval A. Smith,
January 1, 1927
Page No. 3.

we must not make this payment to the bank until his matter is adjusted.

I am writing you to inform you of the situation. I request now that you feel obligated to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted, in other words, I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him. Mr. Parker would have levied upon this payment that we were about to make to the Bank of St. Ansgar had I not stipulated to him as stated above. I suggest that you now have a definite understanding with Mr. Salisbury in reference to this matter. I expect them to treat Mr. Parker as fairly as I have treated them. Our agreement with Mr. Parker was definite. Our arrangement among ourselves was well understood and Mr. Parker is only asking for his rights and what is legitimate. The fact of the

matter is I am very much surprised indeed at the action taken by the bank in this matter, especially after the settlement that has been made beween them and us. We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting. As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our dues in the court. It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as possible.

With kindest personal regards, I am

Yours very truly,

CLEVE W. VAN DYKE.

CWV:T"

That said instrument as herein set up not being such an acknowledgment of the debt sued upon as would relieve the bar of statute of limitations, as pleaded by the defendant, and not being sufficient under the provisions of Section 2068, Revised Code of Arizona 1928, which provides that when an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it

became due shall be admitted in evidence to take the case out of the operation of the law unless such acknowledgment be in writing and signed by the party to be charged thereby.

SPECIFICATION OF ERROR NO. VI.

(Assignment of Error No. VI, Tr. 237-238)

That the Court erred in admitting in evidence in behalf of the plaintiff, over the objection and exception of the defendant, the copy of note set up on page 2 of plaintiff's second amended complaint, the same being read into the evidence from the complaint and being in words and figures as follows:

> "$5,000.00 Chicago, Illinois, October 30, 1917. On or before December 30, 1918, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker, at The St. Ansgar Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.
>
> "It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.
>
> "The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.
>
> (Sgd) HOVAL A. SMITH
> CLEVE W. VAN DYKE

No. 23716
P. O. Miami, Ariz.
and Chicago.

"Endorsed: April 14th, 1927, paid hereon by check, $500.00
June 13th, 1927, paid hereon by check, $500.00"

upon the ground that the same was secondary evidence and no proper foundation was laid therefor, in that it was not shown that the same had been lost or destroyed; and that it affirmatively appeared from the evidence that after the death of Graham Foster, former attorney for the plaintiff, his effects passed into the hands of his surviving wife, and no showing was made that the same was not yet in her possession nor were her depositions taken in the premises, and for the further reason that it did not appear that the plaintiff was the owner and holder of said note.

SPECIFICATION OF ERROR NO. VII.

(Assignment of Error No. VII, Tr. 238-240)

That the Court erred in admitting in evidence in behalf of the plaintiff, over the objection and exception of the defendant, the copy of the note set up on page 8 of plaintiff's second amended complaint, the same being read into the evidence from the complaint and being in words and figures as follows:

"5000.00 Chicago, Illinois, Oct. 30, 1917.

On or before June 30, 1919, for value received, I or we, jointly and severally promise to pay to the order of Bascom Parker at The St. Ansgar

Bank of Brush, Lubiens & Annis, at its office in St. Ansgar, Iowa, Five Thousand Dollars, with interest from date at six per cent per annum, payable annually.

"It is agreed, and consent is hereby given, that if sued, a reasonable attorney's fee may be recovered. Note or interest not paid when due, to bear interest at 7 per cent per annum from maturity.

"The makers and endorsers hereof jointly and severally waive demand, notice of non-payment and protest of this note.

(Sgd) HOVAL A. SMITH
CLEVE W. VAN DYKE

No. 5793
P. O. Bisbee, Ariz.
Miami, Arizona.

"Endorsed: May 21st, 1927, paid
hereon by check, $500.00

July 20th, 1927, by check, $500.00"

upon the ground that the same was secondary evidence and no proper foundation was laid therefor, in that it was not shown that the same had been lost or destroyed; and that it affirmatively appeared from the evidence that after the death of Graham Foster, former attorney for the plaintiff, his effects passed into the hands of his surviving wife, and no showing was made that the same was not yet in her possession

nor were her depositions taken in the premises, and for the further reason that it did not appear that the plaintiff was the owner and holder of said note.

SPECIFICATION OF ERROR NO. VIII.

(Assignment of Error No. VIII, Tr. 240-247)

That the Court erred in finding judgment for the plaintiff herein, in that the judgment of the Court is not sustained by the special findings of fact of the Court, and in Finding of Fact number 5, which said Finding of Fact reads as follows:

> "That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in a written instrument in the following words and figures:
>
> (Here follows the instrument dated January 1, 1927, which is set up in haec verba in Specification of Error No. V herein, and because of its length is not here set up again).
>
> "That the promissory note set forth in Finding 3 is one of the promissory notes mentioned and described in the foregoing instrument. Said instrument was written, signed and delivered by defendant, Cleve W. Van Dyke, to the plaintiff at Miami, in the County of Gila, State of Arizona, on the first day of January, 1927,"

the said written instrument so set up in said Finding of Fact number 5 is not such an acknowledgment under Section 2068 of the Revised Code of Arizona, 1928, which required that when an action is barred

by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law unless such acknowledgment be in writing and signed by the party to be charged thereby; said instrument not containing any acknowledgment of the justness of the claim nor being signed by the defendant appellant, nor containing any express or implied promise to pay the notes which are the subject matter of this action.

Nor is said judgment sustained by special Finding of Fact No. 12, reading as follows:

> "That after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in the written instrument which is set forth in Finding No. 5 upon the First Cause of Action and is one of the promissory notes mentioned and described in said written instrument. Said instrument was written, signed and delivered by defendant Cleve W. Van Dyke to the plaintiff at Miami, in the County of Gila, State of Arizona, on the first day of January, 1927,"

in that the instrument therein referred to is the instrument set up in Haec Verbe in said Finding of Fact No. 5, and said instrument not being such an acknowledgment under Section 2068 of the Revised Code of Arizona, 1928, which required that when an action is barred by limitation no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law unless

such acknowledgment be in writing, and signed by the party to be charged thereby, said instrument not containing any acknowledgment of the justness of the claim nor being signed by defendant appellant, nor containing any express or implied promise to pay the notes which are the subject matter of this litigation.

SPECIFICATION OF ERROR NO. IX.

(Assignment of Error No. IX, Tr. 247)

That the Court erred in making its Finding of Fact No. 4, reading as follows, to-wit:

> "That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon."

upon the ground that there was no evidence to sustain said Finding of Fact, and particularly the Finding of Fact that the plaintiff was still the owner and holder of said promissory note.

SPECIFICATION OF ERROR NO. X.

(Assignment of Error No. X, Tr. 248)

That the Court erred in making its Finding of Fact No. 11, reading as follows, to-wit:

> "That said note was given for a valuable consideration and at the time of the commencement of this action the plaintiff was and still is the

owner and holder thereof, and that no part thereof has been paid except the sum of One Thousand Dollars ($1,000.00) paid in two installments of Five Hundred Dollars ($500.00) each at the dates set forth in the endorsements thereon."

upon the ground that there was no evidence to sustain said Finding of Fact, and particularly the Finding of Fact that the plaintiff was still the owner and holder of said promissory note.

SPECIFICATION OF ERROR NO. XI

(Assignment of Error No. XI, Tr. 248-249)

That the Court erred in making said Finding of Fact No. 5 that after the maturity of said note the defendant Cleve W. Van Dyke acknowledged the justness of the claim of the plaintiff upon said promissory note in a written instrument set up in said Finding of Fact (which said written instrument is set up in Haec Verba in our Assignment of Error number VIII), in that said Finding of Fact is not sustained by the evidence, in that the same is based upon plaintiff's Exhibit No. 4 introduced in evidence, a photostatic copy of which is herein set up in our Assignment of Error Number V, (and in order to avoid repetition the said photostatic copy is not again set up but is made a part of this Assignment of Error by reference to said Assignment of Error No. V), and it appearing therefrom that the said instrument was neither written or signed by said defendant Cleve W. Van Dyke nor was the same a completed instrument, in that a space was left thereon for his signature in the event that he approved of the draft thereof, and that the

typewritter signature at the bottom thereof was never adopted by him, and there is no evidence in this case showing that he adopted said typewritten signature; and for the further reason that the said instrument was inadmissible in evidence under the provisions of Section 2068 of the Revised Code of Arizona, 1928, and was not competent evidence to arrest the running of the statute of limitations pleaded by the defendant Cleve W. Van Dyke in his demurrer to plaintiff's first and second amended complaint and in his answer to the merits of the plaintiff's first and second amended complaint, and therefore is not competent evidence to sustain said Finding of Fact.

SPECIFICATION OF ERROR NO. XII

(Assignment of Error No. XII, Tr. 249-250)

That the Court erred in making its Finding of Fact No. 6 in that portion thereof reading as follows:

> "That the said defendant Cleve W. Van Dyke intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same,"

upon the ground that there is no evidence in the record to support this portion of said Finding of Fact No. 6.

SPECIFICATION OF ERROR NO. XIII

(Assignment of Error No. XIII, Tr. 250)

That the Court erred in making its Finding of Fact No. 13 in that portion thereof reading as follows:

"That the said defendant Cleve W. Van Dyke

intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same,"

upon the ground that there is no evidence in the record to support this portion of said Finding of Fact No. 13.

SPECIFICATION OF ERROR NO. XIV.

(Assignment of Error No. XIV, Tr. 250)

That the Court erred in making its Finding of Fact No. 16, reading as follows:

> "That both of said promissory notes were lost since the commencement of this action and the same cannot be found after diligent search and inquiry, but that the evidence establishes the form and language of said notes as set forth in the foregoing findings,"

in that there is no evidence in the record to support said Finding of Fact.

SPECIFICATION OF ERROR NO. XV

(Assignment of Error No. XV, Tr. 251)

That the Court erred in its Conclusion of Law No. 1, reading as follows, to-wit:

> "That the promissory notes set forth in the first and second cause of action are not, nor is either of them, barred by the statute of limitations of the State of Iowa or the State of Arizona, but that the same are now valid and subsisting obligations,"

in that said Conclusion of Law is contrary to the laws of the State of Arizona and particularly to Section 2061 of the Revised Code of Arizona, 1928, and contrary to the general law of the land in that all matters of limitation and remedy are governed by the law of the forum.

SPECIFICATION OF ERROR NO. XVI.

(Assignment of Error No. XVI, Tr. 251-252)

That the Court erred in its Conclusion of Law No. 2, reading as follows:

> "That the instrument dated January 1st, 1927, written and signed by the defendant Cleve W. Van Dyke is a sufficient memorandum in writing signed by the said defendants to arrest the running of the statute of limitations and to start the period of limitation to running anew under the law of the State of Iowa,"

in that said Conclusion of Law is erroneous in that the law of the State of Iowa has no extra territorial effect, and that the sufficiency of an instrument to arrest the running of the statute of limitations must be governed by the law of the forum, namely, the law of the State of Arizona, and that the instrument dated January 1st, 1927, is not sufficient under the laws of Arizona to arrest the statute of limitations pleaded by the defendant in this cause.

SPECIFICATION OF ERROR NO. XVII.

(Assignment of Error No. XVII, Tr. 252)

That the Court erred in its Conclusion of Law No. 3, reading as follows:

> "That the instrument dated January 1st, 1927 written and signed by the defendant Cleve W. Van Dyke is a sufficient memorandum in writing signed by the said defendants to arrest the running of the statute of limitations and to start the period of limitation to running anew under the law of the State of Arizona,"

in that the said Conclusion of Law is erroneous and contrary to the statutes of Arizona and to the decisions of the Supreme Court of Arizona interpreting Section 2068 of the Revised Code of Arizona, 1928.

SPECIFICATION OF ERROR NO. XVIII.

(Assignment of Error No. XVIII, Tr. 252-253)

That the Court erred in its Conclusion of Law No. 4, reading as follows:

> "That the absence of the defendant Cleve W. Van Dyke from the State of Arizona prevented the operation of the statute of limitations during the period of such absences, and that neither of said notes was barred by limitations,"

in that the absence of the defendant Cleve W. Van Dyke from the State of Arizona had no bearing upon the operation of the statute of limitations, as said cause of action, as appears from the evidence and record herein, was barred long prior to the filing of plaintiff's complaint in this action.

SPECIFICATION OF ERROR NO. XIX.

(Assignment of Error No. XIX, Tr. 253)

That the Court erred in its Conclusion of Law No. 5, reading as follows:

> "That the plaintiff is entitled to judgment against the defendant Cleve W. Van Dyke for the sum of Eight Thousand Dollars ($8000.00), being the unpaid principal of said two promissory notes, with interest at the rate of seven per cent (7%) per annum from the maturity thereof as therein provided until paid, less the sum of One Thousand Dollars ($1000.00) paid upon each of said notes, and for a reasonable attorney's fee in the amount fixed by the Court at the sum of Two Thousand Dollars ($2000.00), and for the costs of this action,"

in that the same is contrary to the laws and statutes of Arizona as applied to the facts in this case, as shown by the record, evidence and pleadings therein.

ISSUES

The question for determination is whether the District court erred in rendering judgment for the appellee and the issues as raised by the Assignments of Error are:

1. Does a complaint state a cause of action where the complainant in order to avoid the statute of limitation sets up an instrument that contains a valid defense to the complaint and fails to allege any facts to avoid the defense which he assumes to state?

2. Was the action governed by the statutes of Arizona (the law of the forum) as to matters of limitation and evidence or by the laws of Iowa (the state where the notes sued upon were payable)?

3. Was the instrument of January 1, 1927, set up

in appellee's amended complaint sufficient to arrest the running of the statute of limitations of Arizona and start it running anew?

4. Did appellant make a settlement with the pledgee of the notes sued upon?

5. Was the appellee a holder in due course of the promissory notes sued upon?

6. Did the findings of fact support the judgment of the trial court?

7. Does the evidence support the judgment of the trial court or its findings of fact?

8. Did the court err in permitting the introduction in evidence of plaintiff's Exhibit No. 4 over the objection and exception of appellant?

BRIEF OF ARGUMENT

I.

THE COMPLAINANT FAILS TO STATE A CAUSE OF ACTION

The amended complaint fails to state a cause of action because it appears upon the face thereof that the alleged first cause of action stated therein accrued on the 30th day of December, 1918, and the second, on the 30th day of June, 1919; that the notes were executed in Illinois and payable in Iowa; that by reason thereof they were barred by the four year statute of limitations of Arizona, unless the instrument dated January 1, 1927, and set up in haec verba in the complaint, is sufficient to arrest the running

of the statute. The appellant pleaded the statute by demurrer, specifically setting it up. The said instrument pleaded by plaintiff neither acknowledged the claim as a subsisting obligation, nor expressed any willingness to pay. The amended complaint also fails to avoid the defense of settlement which plaintiff assumed to set up in his complaint.

(a) When the state practice permits the pleading of the statute of limitations by way of demurrer, the Federal courts follow the same rule.

Bank v. Lowery, 23 L. Ed. 806, 93 U. S. 72.

Mercantile National Bank v. Carpenter, 25 L. Ed. 815, 101 U. S. 567.

Kendall v. United States, 27 L. Ed. 437, 107 U. S. 123.

(b) The practice in Arizona permits the pleading of the statute of limitations by way of demurrer.

Providence Gold Mining Co. v. Marks, 7 Ariz. 74, 60 Pac. 938;

Hagenauer v. Detroit Copper Mining Co., 14 Ariz. 74, 124 Pac. 803;

Gambrell v. McKean, 28 Ariz. 427, 237 Pac. 196.

(c) In order for an instrument to arrest the running of the statute of limitations in Arizona, it must contain both an acknowledgment of the justness of the claim sued upon, and an expression of a willingness to pay same, according to the interpretation placed upon the statute by the Supreme Court of Arizona.

Section 2068, Revised Code Arizona, 1928

Steinfeld v. Marteny, 40 Ariz. 116, 10 Pac. (2d) 367.

(d) The same interpretation that there must be an acknowledgment of the justness of the claim as a subsisting obligation and an expression of a willingness to pay is placed upon similar or identical statutes in other jurisdictions as were placed on this statute by the Arizona Supreme Court in *Steinfeld v. Marteny*, supra.

Bell v. Morrison, 7 L. Ed. 174, 1 Peters 351; (Interpreting Ky. statute)

Shepherd v. Thompson, 30 L. Ed. 1156, 122 U. S. 231;

(Interpreting statute in force in District of Columbia)

First National Bank of Park Rapids v. Pray 288 Fed. 675 (9 C .C. A.)

(Interpreting California statute)

Beckman v. Alaska Dredging Co., (Wash.) 40 Pac. (2) 117;

Tucker v. Guerrier, 170 Wash. 165, 15 Pac. (2) 936;

Griffin v. Lear, 123 Wash. 191, 212 Pac. 271;

Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093;

Coles v. Kelsey, 2 Tex. 541, 47 A. D. 661.

(e) The liability depends not upon the old obligation, but upon the new promise, and action must be brought upon the new promise.

Bell v. Morrison, supra;

Shepherd v. Thompson, supra;

Steinfeld v. Marteny, supra;

Coles v. Kelsey, 2 Tex. 541, 47 A. D. 661;

Tucker v. Guerrier, supra;

Beckman v. Alaska Dredging Co., supra;

McCormick v. Brown, 36 Cal. 180;

Chabot v. Tucker, 39 Cal. 434;

Curtis v. City of Sacramento (Cal.) 11 Pac. 748.

(f) The construction of the statute (Sec. 2068, Rev. Code Arizona, 1928) was squarely before the court in the case of *Steinfeld v. Marteny*, supra, and that case is *stare decises*, and the rule therein expressed became as much a part of the statute as if it were expressly set out therein. It was not obiter dictum.

Leffingwell v. Warren, 67 U. S. 2, 17 L. Ed. 261;

Union P. R. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 50 L. Ed. 134;

Florida Central R. R. Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327;

New York C. & H. R. R. Co. v. Price, 159 Fed. 330 (1 C. C. A.)

(g) In matters of limitation and evidence, the court is bound by the law of the forum and this applies to the interpretation of any instrument pleaded to arrest the operation of the statute. For this rea-

son, the court should have applied the Arizona law, and not the Iowa law.

Scudder v. National Bank of Chicago, 23 L. Ed. 245, 91 U. S. 406;

Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. Ed. 795;

Leffingwell v. Warren, 67 U. S. 599, 17 L. Ed. 261;

Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117;

Connecticut Mutual Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 28 L. Ed. 708;

M'Neil v. Holbrook, 12 Pet. 84, 9 L. Ed. 1009;

Simms v. Hundley, 6 How. 1, 12 L. Ed. 319;

First National Bank of Park Rapids v. Pray, 288 F. 675 (9th C. C. A.);

Walsh v. Mayer, 111 U. S. 31, 28 L. Ed. 338;

(h) The statute was borrowed from Texas by Arizona, and Arizona adopted the construction placed upon it by Texas prior to that time.

Steinfeld v. Marteny, supra.

(i) The Federal decisions are in harmony with the interpretation placed upon the statute by the Arizona Supreme Court.

Bell v. Morrison, 1 Pet. 351, 7 L. Ed. 174;

Clementson v. Williams, 3 L. Ed. 491, 8 Cranch 69;

Shepherd v. Thompson, supra;

Shurter v. Ricker, 62 F. (2) 489 (Texas) (C. C. A. 5);

Moore v. Bank of Columbia, 6 Pet. 86, 8 L. Ed. 329;

First National Bank of Park Rapids v. Pray, supra.

(j) Under none of the decisions interpreting statutes similar to those of Arizona has such an instrument been held sufficient to arrest the running of the statute.

Bell v. Morrison, supra;

Moore v. Bank of Columbia, supra;

Shepherd v. Thompson, supra;

First Nat'l Bank of Park Rapids v. Pray, supra;

Coles v. Kelsey, supra;

Salinas v. Wright, 11 Texas 572;

Rawlett v. Lane, 43 Texas 274;

Krueger v. Krueger, 76 Texas 178, 12 S. W. 1004, 7 L. R. A. 72;

McCormick v. Brown, supra;

Chabot v. Tucker, supra;

Curtis v. City of Sacramento (Cal). 11 Pac. 748;

Clementson v. Williamson, supra;

Bell v. Rowlands, Hardin's Rep. 301 (cited in Bell v. Morrison, supra);

Leigh v. Linthechun, 30 Tex. 103;

Shurter v. Ricker, supra;

Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093;

Beckman v. Alaska Dredging Co., supra;

Tucker v. Guerrier, supra;

Griffin v. Lear, supra.

(k) The statute being a statute of repose, should be enforced according to its intent and object; especially so in a case where the claim has been permitted to remain dormant for a period of more than fifteen years.

Shepherd v. Thompson, supra.

(l) The pledgee of commercial paper is owner thereof as to the makers of the instrument.

Babbitt Bros. Trading Co. v. First National Bank, 261 Pac. 45, 32 Ariz. 588.

(m) When it is shown that the title of any person who has negotiated the instrument was defective, the burden is upon the holder to prove that he is a holder in due course.

Revised Code of Arizona, 1928, Sec. 2381.

Lentz v. Landers, 21 Ariz. 117, 185 Pac. 821;

Arnett v. Reid, 24 Ariz. 410, 210 Pac. 688;

People's Nat'l Bank v. Taylor, 17 Ariz. 215, 149 Pac. 763.

(n) The burden of proof was upon appellee to show not only that he is a holder for value, but that he had no knowledge of facts from which notice of the fraud could be inferred.

Navajo-Apache Bank & Trust Co. v. Willis, 21 Ariz. 610, 193 Pac. 297;

People's Nat'l Bank v. Taylor, supra; Sec. 2381, Revised Code of Arizona, 1928;

Lentz v. Landers, supra;

Arnett v. Reid, supra.

(o) One can only become a holder in due course by an endorsement without restriction in the usual course of business.

Central Trust Co. v. First National Bank, 25 L. Ed. 876, 101 U. S. 68.

(p) When the complaint assumes to state a valid defense it must avoid the confession, and if not, demurrer to it should be sustained.

Kane v. Bloodgood, 11 A. D. 417;

Western Union Tel. Co. v. Yopst, 3 L. R. A. (OS) 224;

Bowlus v. Phoenix Ins. Co., 20 L. R. A. (OS) 400;

Mercantile Nat'l Bank v. Carpenter, supra.

II.

Appellant and appellee placed a practical construction upon the writing dated January 1, 1927, and this construction is binding upon them.

Crunden-Martin Mfg. Co. v. Christy, 22 Ariz. 254; 196 Pac. 454

Mitau v. Roddan, 84 Pac. 145 (Calif.)

III.

In order to adopt a signature made by another there must be an intention to adopt on the part of the

person sought to be charged with the signing and this intention must be definitely expressed.

Richmond Stand. Steel Spike Co. v. Chester-Field Coal Co., 160 Fed. 832 (4 C C A)

IV.

A presumption cannot be based upon a presumption, nor can a basic fact be established by presumption.

Musson v. Lake, 11 L. Ed. 967; 4 How. 262

United States v. Ross, 23 L. Ed. 707; 92 U. S. 281

Manning v. Mutual Life Ins. Co., 25 L. Ed. 761, 100 U. S. 693

United States v. Carr, 33 L. Ed. 483; 132 U. S. 644

V.

In order for appellant to avoid the confession contained in his complaint of the settlement made with the pledgee of the notes he would have to prove that the notes were endorsed over to him in the regular course of business before maturity and without notice of dishonor or defect of pledgee's title.

Central Trust Co. v. First National Bank, 25 L. Ed. 876; 101 U. S. 68

VI

Appellee having appeared on witness stand and failing to testify to basic facts of which he had pe-

culiar knowledge could not rely upon inferior testimony to establish these facts.

Runkle v. Burnham, 38 L. Ed. 694; 153 U. S. 216

Kirby v. Tallmadge, 40 L. Ed. 463; 160 U. S. 379.

VII.

Appellant's answer is sufficient.

Smith v. Sac County, 20 L. Ed. 102; 78 U. S. 139.

ARGUMENT

I.

SPECIFICATIONS OF ERROR NOS. I AND II

(Assignments of Error No. I, Tr. 228-229, and II, Tr. 229-230)

The Court erred in overruling appellant's demurrer (Tr. 23-26) to the first and second causes of action of appellee's second amended complaint (Tr. 10-23).

The second amended complaint fails to state a cause of action, as it appears upon the face of said complaint that the alleged first cause of action stated therein accrued on the 30th day of December, 1918, and the second, on the 30th day of June, 1919; that the notes were executed in Illinois and payable in Iowa; that by reason thereof they were barred by the four year statute of limitations of Arizona, unless the instrument dated January 1, 1927, and set up in haec verba in said amended complaint, is sufficient to arrest the running of the statute. Appellant's de-

murrer to said amended complaint set up that it did not state a cause of action against appellant, and pleaded the said statute of limitations, specifically setting it up.

The instrument pleaded by appellee neither acknowledged the claim as a subsisting obligation, nor expressed any willingness to pay. And in said second amended complaint, appellee failed to avoid the defense of appellant stated in said writing, which appellee assumed to state in his complaint, that defense being that he had made a complete settlement of the disputed liability upon said notes in question with the pledgee of the instruments (The St. Ansgar Bank) while the notes were in said bank's possession, nor was it pleaded that appellee was the holder in due course of said instrument, nor any facts which would establish that he was such a holder in due course.

It will be noted that the original complaint was filed on January 21, 1931 (Tr. 7), more than eleven years after the accrual of the alleged causes of action.

STATUTE OF LIMITATIONS MAY BE PLEADED BY DEMURRER

The statute of limitation of Arizona provide:

> "There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, the following actions: * * * * 3. upon a judgment or decree of any court rendered without this state, or upon an instrument in writing executed without this state." Section 2061, Subd. 3, *Revised Code of Arizona* 1928.

The practice in Arizona provides that a defense based upon the ground that a cause of action is barred by the statute of limitations, may be pleaded by demurrer when the claim appears to be barred on the face of the complaint. This rule has been in force in Arizona since the year 1900.

In the case of *Providence Gold Mining Co. v. Marks*, 7 Ariz. 74, 60 Pac. 938, the court says:

> "The ruling of the United States Supreme Court *(Bank v Lowery*, 93 U. S. 72, 23 L.ed. 806, citing and approving *Howell v Howell*, 15 Wis. 55) under a statute identical with ours has been recognized and followed without exception." (p. 79).

This holding has been followed in all subsequent decisions in the Supreme Court of Arizona.

> *Hagenaur v Detroit Copper Mining Co.*, 14 Ariz. 74; 124 Pac. 803.
>
> *Gambrell v. McKean*, et al, 28 Ariz. 427; 237 Pac. 196.

This rule of practice applies in cases tried in the Federal Court. In construing the statute of limitation of Wisconsin in *Bank v. Lowery*, 23 L.ed. 806, 93 U. S. 72, the Court says:

> "As this is the law of Wisconsin, the Circuit Court of the United States for the Western District of Wisconsin is bound by it, and as the decision in the principal case accords therewith, the first assignment of error cannot be sustained."

The Supreme Court of the United States in the case

of *Mercantile National Bank v. Carpenter*, 25 L. Ed. 815, 101 U. S. 567, said:

> "Our reasoning in the case at law and the authorities there cited are applicable here. It appears on the face of the bill that the case which it makes is barred by the statute of limitations, and that the excuse of concealment of 'the cause of action' by defendants, is not so alleged as to avail the complainant. This defect can be taken advantage of by demurrer. (Citing cases). The demurrers of the defendant were therefore rightly sustained and the appeal was properly dismissed."

A similar ruling was made by the United States Supreme Court in *Kendall v. United States*, 27 L. Ed. 437, 107 U. S. 123.

At the time the said demurrer was overruled as to appellant, the court filed his "Memorandum Ruling" thereon (Tr. 27-37) wherein he states.

> "The notes are expressly payable in Iowa and the causes of action thereon accrued there. Where a note is executed in one state and made payable in another, the general rule is that it is governed as to its nature, validity, interpretation and effect by the laws of the state in which it is payable without regard to the place where it was written, signed or dated, it being presumed that the parties contracted with reference to that place. *8 Corpus Juris, 92;* (Citing cases).

The Court then cites from Section 11018, Code of Iowa, 1927, which is as follows:

> "Causes of action founded on contract are revived by an admission in writing, signed by the party to be charged that the debt is unpaid, or by a like new promise to pay the same." (Tr. 30).

The Court then cites numerous Iowa and New Mexico cases to the effect that the cause of action is revived by the admission alone, and that the admission need not in terms imply a promise or willingness to pay, and the court then said:

> "Irrespective of the statements in the letter of Mr. Van Dyke's reasons for refusing to pay the notes, or of the assumption of the payment of the same by others, his admission is clear and unequivocal that the two notes for $5,000.00 each, given to Mr. Parker in payment for his stock in the Calhoun Lumber Company are unpaid.
>
> "It is clear that the statement signed by Mr. Van Dyke constitutes, as to him, sufficient admission under the statute of Iowa, as interpreted by the Courts of that State, to revive the debt, or to set the statute running anew on the notes on which action has been instituted in this court." (Tr. 36).

LAW OF FORUM GOVERNS

It will be noted that the Court interprets the said writing as meaning that Van Dyke was giving his "reasons for refusing to pay the notes."

From this, it will be seen, that the Court in making its ruling on the demurrer, was guided by the Iowa statute, and not by the statute of Arizona.

An examination of the authorities will show that the court's holding that appellant's demurrer should be overruled because the facts stated in the second amended complaint were sufficient under the Iowa law to arrest the running of the statute and that the trial court was bound to overrule the demurrer for that reason, was erroneous for the reason that the matter was governed by the Arizona statutes.

We would like to call the Court's attention to the decisions of the Supreme Court of the United States, interpreting *Title* 28 of *U. S. Code*, *Sections* 724 and 725 thereof, being the provisions of the Conformity Act and the law, and providing that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply. (R. S. Sec. 721)."

In interpreting this law, the Supreme Court of the United States in the case of *Scudder v. National Bank of Chicago*, 91 U. S. 406; 23 L. Ed. 245, lays down the rule governing the application of the sections in regard to the admissibility of evidence and statutes of limitation in the following language:

> "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, *statutes of limitation*, depend

upon the law of the place where the suit is brought." (Italics ours).

And the same court in the case of *Bucher v. Cheshire R. Co.* 125 U. S. 555; 31 L. Ed. 795, says:

> "It must be admitted that it (the statute) does provide that the laws of the several states shall be received in the courts of the United States in cases where they apply as the rules of decision in trials at common law."

and it cites *Leffingwell v. Warren*, 67 U. S. 599, 17 L. Ed. 261, in regard to statute of limitations as follows:

> "The construction given to a statute of a state by the highest judicial tribunal of such state is regarded *as a part of the statute*, and is as binding upon the courts of the United States as the text." (Italics ours).

The above case also quotes *Ex Parte Fisk*, 113 U. S. 713, 28 L. Ed. 1117, as follows:

> "It has often been decided in this court that in actions at law in the courts of the United States, the rules of evidence and the laws of evidence generally of the state prevail in those courts."

In the case of *Connecticut Mutual Life Insurance Co. vs. Union Trust Co.*, 112 U. S. 250, 28 L. Ed. 708, the court says:

> "As to Section 914, it is sufficient to say that it does not modify section 721 in so far as the latter makes it the duty of the courts of the United States in trials at common law, to enforce (except where the laws of the United States

otherwise provide) *the rules of evidence prescribed by the laws of the state in which they sit.*" (Italics ours).

In the case of *M'Neil v. Holbrook*, 12 Peters 84, 9 L. Ed. 1009, the court says:

> "In some cases the laws of the states require written evidence. In others, it dispenses with it, and permits the party to prove his case by parol testimony; and what rule of evidence could the courts of the United States adopt, to decide a question of property, but the rule which the Legislature of the state has prescribed?"

In the case of *Simms v. Hundley*, 6 Howard 1, 12 L. Ed. 319, the court says:

> "It is true, that, upon general principles of commercial law, the certificate would not be admissible. But it is made evidence by the statute of Mississippi, and the rules of evidence prescribed by the statute of a state are always followed by the courts of the United States, when sitting in the state, in commercial cases as well as in others."

The Ninth Circuit Court of Appeals in the case of *First National Bank of Park Rapids vs. Pray*, 288 Fed. 675, held that they were bound by the construction of the state statute by the Supreme Court of California. The plaintiff had offered in evidence seventeen letters, eight signed by the defendant in California and addressed to the officers of the plaintiff bank in Park Rapids, Minn., and nine signed by officers of the plaintiff bank in Park Rapids, Minn.,

and addressed to the defendant in California. The defendant objected to these letters on the ground that they were immaterial, irrelevant and incompetent and did not tend to prove waiver of the statute of limitations or the question of forbearance. The objection was sustained by the court, and thereupon the defendant moved for a non-suit, which was granted, and the plaintiff brought the suit to the Circuit Court of Appeals upon a writ of error. The Circuit Court of Appeals in sustaining the judgment of the Trial Court says:

> "But the statute, as construed by the Supreme Court of the state, following a decision of the Supreme Court of the United States by Mr. Justice Story in *Bell v. Morrison*, 1 Pet. 351, 362, 7 L. Ed. 174, requires an acknowledgment of the liability to pay and a willingness to pay."

And quotes at length from Judge Story's opinion. As the California statute is practically the same as our statute, and as the Ninth Circuit is the Circuit in which this district is situated, and as the facts in that case are very much like the facts in the case at bar, we suggest to the Court that it lays down a rule governing the interpretation of such suits that is binding upon the District Court of Arizona.

The same principle is involved in the case of *Walsh v. Mayer*, 111 U. S. 31, 28 L. Ed. 338, where the notes were drawn in New Orleans, La., where they were endorsed and delivered. The instrument relied upon was a letter of the defendant written in the state of Mississippi. The action was brought in Mississippi, and the defendant claimed the benefit of the statute of limita-

tions of that state. The Supreme Court of the United States says:

> "On these facts, two questions arose: first, whether the bar of the statute of Limitations was prevented by a sufficient acknowledgment or promise by the defendants as makers of the note; and second, whether the usurious interest paid by them could be applied in reduction of the principal debt."

The trial court held that the laws of Mississippi governed. The instrument relied upon was held to be such a definite recognition and acknowledgment of the debt under the laws of the state of Mississippi as would take the claim out of the operation of the statute of limitations of that state, and the Supreme Court held:

> "The Circuit Court rightly held that the Statute of Limitations of Mississippi, being the law of the forum, was the one applicable to the case;"

and held that the Trial Court was right in holding that the instrument was sufficient under the laws of Mississippi to prevent the operation of the statute of limitations as aforesaid.

The importance of this decision will be understood when we consider the law of the state of Louisiana in regard to limitations. Under the law of Louisiana, as defined by the Supreme Court of that state, the debtor must renounce the acquired prescription. See *Succession of Slaughter—on Opposition of Gardner*, 108 La. 492; 58 LR A (OS) 408, where the court in construing an instrument says:

> "The letter and the payment taken together amount to nothing more than an acknowledgment of the existence of the debt. They neither expressly nor tacitly renounce the acquired prescription. A man may acknowledge his debt, and pay part of it, without renouncing the prescription acquired on it."

From the above, it is clear that if the Supreme Court of the United States in the *Walsh v. Mayer* case had applied the law of Louisiana to the interpretation of the letter written in the state of Mississippi, its decision would have been for the defendant.

If the District Court of Arizona in the case at bar had followed the rule laid down by the Supreme Court of the United States in *Walsh v. Mayer*, supra, it would have interpreted the writing under the laws of the State of Arizona instead of under the law of Iowa, and its decision would have been in favor of appellant upon his demurrer.

INSUFFICIENCY OF INSTRUMENT TO TOLL STATUTE

Section 2068 of *Revised Code of Arizona* provides:

> "Sec. 2068. ACKNOWLEDGMENT AFTER BAR MUST BE IN WRITING. When an action is barred by limitation, no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law, unless such acknowledgment be in writing and signed by the party to be charged thereby."

In the light of the statements contained in the writ-

ing dated January 1, 1927 (Tr. 12-17), any acknowledgment of the justness of the claim sued upon as a subsisting obligation cannot be inferred therefrom, for it appears from said writing that it was merely a communication from appellant to his co-maker of the notes advising him of the situation. He states therein that the notes had been taken over by the St. Ansgar Bank of Brush, Lubiens & Annis (Tr. 14); that appellant claimed that he did not owe the money (Tr. 14); that he had a good defense against the Bank (Tr. 14, 15), and that neither he nor the Calhoun Timber Company had received any consideration for the notes (Tr. 14); that the whole matter was a fraud and that the bank could not hold him for any amount (Tr. 14, 15, 63); that the settlement with the St. Ansgar Bank was made in order to avoid litigation (Tr. 17), and Hoval Smith and appellant agreed to a settlement with the understanding that all notes and obligations were included therein (Tr. 15); that no notice of any claim that these notes were unpaid was given to appellant until January 1, 1927 (Tr. 15). Appellant assigned as his reason for making the compromise settlement at the time that his health was poor; that Hoval Smith's affairs were involved; that times were hard and they felt they had better make an amicable settlement rather than seek their dues in court (Tr. 17).

It will thus be seen that appellant claimed in this instrument that he had made a settlement with the pledgee of the notes and that there was no liability any longer existing thereon; that he made the settlement because of the condition of his health and the desire to avoid litigation and that he had regarded the matter as being settled up to the time that appellee had called

upon him on January 1, 1927. Such a claim is directly contrary to the claim that the instrument was an acknowledgment of the justness of the claim as a subsisting obligation.

Nor is there a single expression in this writing that can be fairly construed into an expression of a willingness to pay the claims. Indeed, a reading thereof shows clearly that the purpose of the writing was to inform Hoval Smith of appellee's call upon appellant and the desire of both appellant and appellee that Hoval Smith should visit the bank, explain the situation to its officers and induce them to make a settlement with the appellee and to notify Smith that appellee had requested appellant not to make any payments to the bank on the notes that appellee and Smith owed the bank until they made an adjustment of this matter with appellee (Tr. 16). We cannot see how this could possibly be tortured into an expression of a willingness to pay the claim sued upon.

The explanation of the theory of both court and counsel for appellee is fully set forth in the court's memorandum ruling appearing in the transcript, pages 27 to 37 thereof, wherein it appears that the court rested its decision upon Section 11018 of the Code of Iowa, 1927, providing as follows:

> "Causes of action founded on contract are revived by an admission in writing, signed by the party to be charged that the debt is unpaid, or by a like new promise to pay the same."

And the court's reasons are stated in the following language:

> "It is clear that the statement signed by Mr. Van Dyke constitutes, as to him, sufficient admission under the statute of Iowa, as interpreted by the courts of that state, to revive the debt, or to set the statute running anew on the notes on which action has been instituted in this court."

From the above it clearly appears that the ruling upon the demurrer was due to the court's misunderstanding of the law applicable to the case, he having construed it as being governed by the law of Iowa and not by the law of the forum; that the court had in mind that all that was necessary under the Iowa statute was an admission that the debt had not been paid and that it did not matter that the maker of the note refused to pay the same. Indeed the court states in this opinion that such was the law of Iowa, and irrespective of appellant's reasons for refusing to pay the notes (Tr. 36), the instrument was sufficient under the law of that state.

Assuming for purpose of demurrer, that the letter was properly signed, we submit that it is not a sufficient instrument to cause the second amended complaint to be invulnerable to appellant's demurrer setting up the applicability of the Arizona statute of limitations. We will now attempt to demonstrate this by an analysis of the instrument, placing the statements contained therein relevant to the issue raised by the amended complaint and demurrer in logical order.

The purpose of appellant in writing it is disclosed in this extract:

"I am writing you to inform you of the situation. I request now that you feel obliged to Mr. Parker to ful-

fill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted, in other words I request that you, upon your return to Arizona, stop at St. Ansgar, see Mr. Salisbury and present this matter to him." (Tr. 16).

The statement to Parker referred to above is in the following excerpt:

> "When Mr. Parker arrived I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000. He has notified me that we must not make this payment to the bank until his matter is adjusted." (Tr. 16)

Appellant then gives his reason for complying with the demand of appellee that he must not pay the $10,000 due the bank until the bank settles with appellee.

> "Mr. Parker would have levied upon this payment that we were about to make to the bank of St. Ansgar had I not stipulated to him as stated above." (Tr. 16).

So, far from acknowledging the justness of the claim as a subsisting obligation or expressing a willingness to pay the same, he states directly to the contrary:

> "The notes were returned to the St. Ansgar Bank from the Gila Valley Bank of Miami, the bank to whom they were sent for collection. The refusal was based upon the grounds that I did not owe the money, that the stock had been turned over to Mr. Lubiens and that he owed the money

for the amount due, as I had paid my share in full." (Tr. 14).

and again:

"I refused to pay the same at the time because I had already paid the share due from me and later I paid a further sum of $10,000 which was the original cash paid to Mr. Parker." (Tr. 14).

Further on he says:

"In my opinion at the time this matter was brought to my attention by you and by Mr. Salisbury, the whole matter was a fraud and that the bank could not hold me for any amount."

Appellant then proceeds to give his reasons for the compromise that he had entered into with Lubiens and the bank and for which he had given a note in the sum of $10,000 to the bank. This is not one of the notes set up in the complaint, but is the one referred to on page 16 of the transcript, and which appellee had requested appellant not to pay the bank until the bank had settled with appellee.

"Time went on and at your insistence an agreement was reached between ourselves and the St. Ansgar Bank. In order to avoid litigation we agreed to a settlement between the bank and ourselves with the understanding that all notes and obligations were to be included within this settlement. No notice has ever been received by me from the Bank of St. Ansgar or Mr. Lubiens that they had not taken up these notes when they were refused payment by me for the cause stated above. I was under the impression that Mr. Lubiens and

bank, having been notified by me that it was their obligation, had assumed these notes and that they were still held by them and was part of the consideration upon which our settlement was based. What was my surprise to learn the other day upon the arrival of Mr. Parker that the bank, instead of including these notes in our settlement as I presumed was being done, had returned the notes to Mr. Parker unpaid. And now Mr. Parker has presented these notes to me for payment." (Tr. 15).

Further on in the writing he makes this statement:

"We were trying to seek a way out of our difficulties and the way out unloaded over a quarter of a million dollars of obligations upon myself, which, while it is unfair, was arranged in order to avoid troublesome litigation and a long period of contest and fighting."

And later on in the writing says:

"As you know, we discussed the matter and we decided that it would take a large sum of money and a long time to work out this litigation. My health was poor, your affairs were involved, times were hard and we felt that we might better make an amicable settlement rather than seek our dues in the court." (Tr. 17).

The other portions of the instrument are devoted to a history of the transaction and appellant's claim that he had done all that could reasonably be required of him; that he had paid all the money which had been paid in the transaction; and had paid the liabilities created by the transaction, in a sum in excess of $100,000. The writing closes with a request to his co-de-

fendant to see Mr. Salisbury and get the matter clarified:

> *"It may be that Mr. Salisbury does not know about this situation, and if he does not, you should apprise him of it and clarify it as soon as possible."*

It is clear from the portions stated that the appellant did not regard himself as the debtor of the appellee; that he felt that he had been defrauded in the transaction, and that to avoid litigation, and because his health was poor, he had made a compromise and settlement with the bank which had in its possession the notes that are now sued upon, and for which the appellee had received money from the bank.

Under none of the authorities that we have been able to find have such statements as are contained in this instrument been interpreted as expressive of an acknowledgment of the justness of a claim as a subsisting obligation, or as expressing a willingness to pay the claim.

Letters containing similar statements to those contained in the instrument dated January 1, 1927, have been often introduced into cases for the purpose of maintaining an action that has been barred by the statute of limitations of the various states in which such actions were brought. An examination of these cases will show that where the statutes of limitation are identical with, or similar to those of Arizona, Texas, California, Tennessee, Kentucky and various other states, transactions of this nature have been held insufficient for the purpose of avoiding the statute of

limitations or extending the time for the bringing of the action.

The question has been before the Supreme Court of the United States many times. As early as 1814 the question came before the Supreme Court of the United States in the case of *Clementson v. Williams*, 8 Cranch 693, L. Ed. 491. The court says:

> "At the trial the plaintiff gave evidence tending to prove the partnership, and also to prove dealings of Clarke & Co. with the plaintiff. He then offered a witness who proved that he presented, in December preceding the trial, to John Clarke a certain account against the said John Clarke & Co., in favor of the plaintiff; and that said Clarke stated that the said account was due, and that he supposed it had been paid by the defendant, but had not paid it himself, and did not know of its being ever paid. And the witness to whom the said Clarke made the said acknowledgment produces in court the identical account so presented to said Clarke and acknowledged by him as aforesaid, which account is in the words and figures following, towit: 'an account', etc. 'And the plaintiff's counsel offered the contents of said account, and the acknowledgment of said Clarke, in evidence under the issue joined upon the plea of the statute of limitations, but the court decided that the said evidence so offered by the plaintiff of the contents of the said account, and of the acknowledgment of the same by the said Clarke, was not admissible evidence in this cause, and refused to admit the same'."

On appeal to the Supreme Court of the United States the ruling of the Trial Court was sustained and Chief Justice Marshall in delivering the opinion of the court used the following language:

> "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.
>
> "In this case there is no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this it not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not, then, sufficient to take the case out of the act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due.
>
> "*** The declaration of Clarke that he had not himself paid it, and that he did not know whether his partner had paid it or not, is no proof that the debt remains due, and therefore is not such as acknowledgment as will take the case out of the statute of limitations."

In the case of *Bell v. Morrison*, et al, 1 Pet. 351, 7 L Ed. 174, we quote the following extracts from the letters relied upon, which letters were held insufficient:

> "I know we are owing you and I am anxious it should be settled."

Defendant then offered plaintiff $7,000.00 in settlement.

"I wish whatever is due to you should be paid."

"I have no doubt but your account can be adjusted; and that, more to your satisfaction than it ever can be from the result of your suit."

"I wish your account settled; and I have no hesitation in saying, on your coming here, it will be done."

"*** for the purpose of adjusting some of the affairs of the old Saline Company ***will be present, in order that a settlement may be effected, if possible, of the account which you set up against the company."

"*** for the purpose of adjusting our old account with you."

"I hope, therefore, you will be at Hopkinsville, for the purpose of enabling us to settle this old affair, to which, I am sure, all must be most anxious."

"*** for the purpose of adjusting the old company account."

The court cited from *Hardin's Reports*, 301, in *Bell v. Rowland's Administrators*, "that he had once owed the plaintiff, but he supposed his brother had paid it, in Virginia (the place where the original transaction took place, in the year 1785); and if his brother had not paid it, he owed it yet." The court held that the acknowledgment was not sufficient to take the case out of the statute.

In the case of *Moore v. Bank of Columbia*, 6 Pet. 86, 8 L. Ed. 329, the defendant stated that he had paid all his debts "except one damn $500.00 in the Bank of Columbia, which I can pay any time." The court held the same was insufficient.

In the case of *First National Bank of Park Rapids v. Pray*, Supra. the substance of the letters are set out. They are stronger than those in the instrument dated January 1, 1927, in the case at bar. This Honorable Court held they were insufficient.

In the case of *Salinas v. Wright*, 11 Tex. 572, there was a clear a acknowledgment of the debt, together with a promise to pay as soon as circumstances would permit. The instrument was held insufficient.

In the case of *Rawlett v. Lane* (1875), 43 Tex. 274, there was an acknowledgment of the debt, coupled with this language: "which I promise to pay at the earliest possible moment." Acknowledgment was held insufficient.

In the case of *Krueger v. Krueger*, 76 Tex. 178, 12 S. W. 1004; 7 L R A 72, the letter relied upon is set up and the court holds it insufficient, though it contains a clear acknowledgment of the debt. The court cites *Coles v. Kelsey*, 47 A D 661, and also says:

> "An acknowledgment which will take a debt out of the bar of the Statute of Limitations must be clear and unequivocal, and neither qualified by conditions nor limitations. *McDonald v. Grey*, 29 Tex. 83; *Dickinson v. Lott*, Id. 173; *Madox v. Humphries*, 24 Tex. 196; *Smith v. Fly*, Id. 353.

"Considered in the light of these authorities, we think it too clear for argument that the letter relied on by plaintiff to take the barred note out of the operation of the Statute of Limitations is not sufficient for that purpose. It does not contain a clear, unequivocal and unconditional acknowledgment of the justness of plaintiff's demand, nor does it contain an expression of a willingness to pay. We think it settled by the authorities, supra, that the acknowledgment, to relieve the claim from the operation of the Statute of Limitations, must contain an unqualified admission of a just, subsisting indebtedness, and express a willingness to pay it. If the expression of a willingness to pay is coupled with conditions, it devolves upon the plaintiff to prove that the named conditions have taken place. *Leigh v. Linthecum*, 30 Tex. 103."

The following California cases sustain the rule that an acknowledgment alone is not sufficient to bar the statute, that the writing must contain as well an expression of a willingness to pay the claim sued upon and that the action must be brought upon the new promise:

McCormick v. Brown, 36 Calif. 180

Chabot v. Tucker, 39 Calif. 434.

Curtis v. City of Sacramento (Calif.), 11 Pac. 748.

We think it evident that there is no clear, unequivocal acknowledgment of the claim in the instrument dated January 1, 1927, which is neither qualified by

conditions or limitations as a subsisting obligation, from which a willingness to pay could be implied. It will not do, according to all the authorities, to pick out some statement standing by itself and base an interpretation of the instrument upon it, totally disregarding the context.

It will be noted that while the instrument does not upon its face show that it was written at Miami, Arizona, it does appear therein that it was written at Miami, and the complaint shows that appellant's residence was at Miami, Arizona. Even if this did not appear, the rule that the pleading must be construed most strongly against the pleader would require that presumption.

The statute of limitations, *Section 2061*, being a statute of repose, should be enforced according to its intent and object; especially so in a case where, like this, the claim has been permitted to remain dormant for a period of more than eleven years.

The Supreme Court of the United States in the case of *Shepherd v. Thompson*, 30 L. Ed. 1156 at p. 1157, 122 U. S. 231, says:

> "The principles of law by which this case is to be governed are clearly settled by a series of decisions of this court. The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose."

This case is also important as disclosing what such an instrument must contain in order to be available to

the plaintiff in the instant case for the purpose of removing the bar of limitations. The court there says:

> "If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action."

The consideration for the new agreement, and not the old debt, is the measure of plaintiff's right; the court in the above case saying:

> "But the new promise, and not the old debt, is the measure of the creditor's right."

The language of the Circuit Court of Appeals for the Fifth Circuit in *Shurter v. Ricker*, 62 F. (2) 489, at p. 493 expresses clearly the correct interpretation which should be placed upon an instrument such as the one relied on in the case at bar:

> "A careful examination of these letters relied on to constitute a new promise convinces us that Mrs. Shurter never intended to, and never did, acknowledge that she owed a debt, or express a willingness to pay it. The most that can be said is that she expressed a desire to assist Ricker in his difficulties,"

and the court further says:

> "It would be most unfair to single out a word or phrase, and ignore the context."

The contention of the appellee in that case was that certain phrases in those letters constituted such an admission of the indebtedness as entitled the plaintiff to recover.

RULE ESTABLISHED BY ARIZONA DECISION

The issues in this case are governed by the statutes of Arizona, and particularly by *Sections 2061* and *2068* of the *Revised Code of Arizona*, 1928. These issues have been determined by the Supreme Court of Arizona in the case of *Steinfeld v. Marteny*, 40 Ariz. 116, where there was involved the sufficiency of a writing to toll the statute of limitations.

In that case the plaintiff had introduced several letters written and signed by the defendant to the Loan Company, the predecessor in interest of the plaintiff, and a financial statement to the Loan Company in the handwriting of the defendant and signed by him. The letters generally asked for leniency and expressed the hope that he would be able to pay from cattle sales and sales from his ranches enough to reduce or pay off what he owed. Witnesses stated, and they were not contradicted, that on August 8th, the date the financial statement was rendered, this note was not paid. The court states the question before it in this language:

> "The question is as to whether this evidence shows such an acknowledgment of the justness of the debt evidenced by the note as is contemplated by the statute to stop and restart its running. The pertinent statute, section 2068, Revised Code of Arizona, 1928, reads as follows:" (quoting section, heretofore set up in this brief).

After stating that the exclusive method of tolling the statute is by written acknowledgment of the justness of the claim made subsequent to the accrual of the right of action and either before or after the bar, the court goes on to say that "loose and general expressions, which are merely casual, respecting acknowledgment of a debt, are insufficient," and cites *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093.

The court then pointed out that *Section 2068* was taken from Texas, and that it is practically the same in wording and means exactly the same thing as Article 5705,*Vernon's Sayles' Tex. Civ. Sts.* 1914. It quotes from the case of *Coles v. Kelsey*, 2 Tex. 541, 47 Am. Dec. 661, which was decided in Texas long prior to the adoption of the statute by Arizona, as follows:

> "That there must be an acknowledgment of the debt existing, and an expression of a willingness to pay it; both must concur; and acknowledgment of the debt is not sufficient; but there must be an expression of a willingness to pay."

The court further says that this seems to be the rule in other jurisdictions and quotes authorities. Referring particularly to the instruments introduced for the purpose of tolling the statute, the court says:

> "It could hardly be said that he admitted the justness of each and every item of such indebtedness or a willingness to pay the whole thereof. If Marteny may be said to have included the note in the item of $38,410 which he admitted owing the loan company, he did not thereby admit a willingness to pay the same."

The court held that the written instruments intro-

duced were insufficient as a matter of law to toll the statutes under the provisions of *Section 2068* of the *Revised Code of Arizona*, 1928. It adopted specifically the holding of the Texas Supreme Court in the case of *Coles v. Kelsey*, Supra.

That the decision of the Supreme Court of Arizona in the case of *Steinfeld v. Marteny*, supra, established a binding rule of law which should be applied by the Federal Court is clear from an examination of the facts as stated in the opinion in that case. As we have heretofore pointed out the interpretation of *Section 2068* was the important question before the court, properly raised and duly considered by the court, showing that the language used could in no sense be interpreted as *obiter dictum.* In case the question should be raised in this court, we submit that the rule which determines what is obiter dictum is stated by the Supreme Court of the United States in the case of *Union P. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, 50 L. Ed. 134, as follows:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum."

And the court also says in the opinion:

> "Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling of neither is obiter, but each is the judgment of the court, and of equal validity with the other."

And in the leading case of *Florida Central R. R. Co. v. Schutte*, 103, U. S. 118; 26 L. Ed. 327, the court says:

> "As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this Company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no just sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

The United States Circuit Court of Appeals for the First Circuit in the case of *New York C. & H. R. R. Co. v. Price*, 159 Fed. 330, says:

> "We cannot escape the force of the case of *Byrnes v. Boston & M. R. Co.* 181 Mass. 322, 63 N. E. 897, by disregarding as dictum the expression 'the omission to fence does not render a railroad company liable except as against adjoining owners.' Assuming that the facts were such that

> no obligation to fence existed under the terms of the Massachusetts statute, and that the case so held, nevertheless, as an additional reason for its decision, the court construed the statute, and held that the obligations imposed by it were solely in favor of adjoining owners." (Citing numerous U. S. Supreme Court decisions upon the question of what is dictum).

And the court also says:

> "Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize."

It will thus be seen that not only was the interpretation of the Supreme Court of Texas adopted as a part of the statutes on its enactment, but it was also specifically adopted in the case of *Steinfeld v. Marteny*, supra.

The case of *Coles v. Kelsey*, supra, is also important in that it is based upon the case of *Bell v. Morrison*, 1 Pet. 360; 7 L. Ed. 174, and therefore was an adoption of the rule laid down by the Supreme Court of the United States prior to the adoption of the Texas statute. The *Coles v. Kelsey* case also distinctly holds that when an instrument is relied upon to toll the statute of limitations, the action must be brought thereon as a new cause of action and not a revival of the old one, and we believe this to be the law of Arizona. In the case at bar the complaint is based upon the theory that the cause of action is upon the original notes. In this his complaint is consistent, for such is the law of Iowa, but as we have pointed out that law

has no application to a foreign jurisdiction. Many other cases uphold the doctrine of *Coles v. Kelsey*, supra.

In strict harmony with the decision of the Arizona Supreme Court in *Steinfeld v. Marteny*, supra, are the decisions of the Washington Supreme Court.

A late case is that of *Beckman v. Alaska Dredging Co.*, 40 P. (2) 117, where the issue was as to the sufficiency of an acknowledgment. That court, in adopting the rule laid down by the Supreme Court of the United States in *Bell v. Morrison*, supra (which it cited in an earlier Washington case as one of its authorities), refers particularly to the earlier cases in Washington, holding that where the instrument relied upon as an acknowledgment is executed after the statute has already run, the cause of action rests wholly on the written instrument and the action is upon the new promise contained therein; and that a mere acknowledgment of the debt or the expression of an intention to pay is not sufficient to revive the debt.

The court quotes from the case of *Tucker v. Guerrier*, 170, Wash. 165, 15 P. (2d) 936, 937, as follows:

> "If the cause of action is to be revived, it must be based wholly on the written statement. A new promise must be clear, distinct, and unequivocal, as well as certain and unambiguous. The mere acknowledgment of a debt, or the expression of an intention to pay, is not sufficient to revive the debt. (Citing cases).
>
> " 'But where the acknowledgment is made after the statute has already run, the action must be

upon the new agreement; consequently it is in the nature of an original obligation and should be strictly construed. The debt being barred, it is possible that one may acknowledge it without intending to pay it. If this distinction is kept in mind most of the apparent inconsistencies in the cases will be cleared up' *Griffin v. Lear*, 123, Wash. 191, 212 P. 271, 275."

Directly in point is the case of *Tucker v. Guerrier*, supra, where the court says:

"It is at once apparent that the writing relied upon purports to be nothing more than ' a correct statement of the Meredith Timber Acccount'. There is nowhere anything in the nature of a promise to pay or from which a promise to pay may be inferred. The most that can be said of it is that it is an acknowledgment that such an account actually existed in the past."

AMENDED COMPLAINT STATES VALID DEFENSE OF APPELLANT, WHICH IS NOT AVOIDED BY PLEADING

The demurrer of the appellant should have been sustained for the further reasons:

While a plaintiff ordinarily is not required to anticipate in his complaint any defense that may be made by the defendant, there are times when it is necessary for him to do so, as in the instant case where it was necessary that plaintiff plead the instrument he relied upon to toll the statute of limitations, which statute had been pleaded by appellant's demurrer to the original complaint and the demurrer had been

sustained. Appellee, for the purpose of rendering his complaint invulnerable to further demurrer upon the ground of the statute of limitation, pleaded the writing dated January 1, 1927, and in so doing he necessarily pleaded the defenses contained therein, namely:

That plaintiff appellee had pledged the notes sued upon to the Bank of St. Ansgar (Tr. 14); that during the time the notes were in the possession of the bank as pledgee appellant and his co-defendant made a settlement with the bank, which included the notes in question (Tr. 15); that settlement was made with the bank in order to avoid litigation (Tr. 17), and no claim that they were not settled was ever made after this settlement upon the notes until January 1, 1927 (Tr. 15). As we show elsewhere in this brief, the pledgee being the owner of the legal title as against the makers, any settlement made with such pledgee was binding upon the plaintiff.

It would have been sufficient for the purpose of tolling the statute of limitation, had plaintiff pleaded in avoidance of the defensive matter stated in said writing sufficient facts to avoid the same. This he did not do, and as the amended complaint stands he pleaded a confession and failed to plead an avoidance.

It was incumbent upon the plaintiff to show in his amended complaint that he had acquired the notes from the bank by endorsement before maturity and in the regular course of business, thus disclosing that he was a holder in due course. In no other manner could he avoid the effect of the settlement made with the bank and in no other manner could he avoid the de-

fense which he assumed to state in his amended complaint.

When the bank became the pledgee of the notes it became as to the makers thereof the absolute owner.

> "The pledgee of a negotiable instrument is the conditional owner of the paper as between himself and the pledgor, but as to the rest of the world, including the maker, he is absolute owner. (Citing cases.)"
>
> *Babbitt Bros. T. Co. v. First National Bank*, 32 Ariz. 588, at p. 593.

The pledgor did not show any transfer back to himself for this pledge to the bank. In order for the appellee to recover he would have to be a holder in due course, and this he could not be unless the notes were transferred back to him by the bank by an endorsement in the regular course of business prior to maturity and for value.

The Supreme Court of the United States said in the case of *Central Trust Co. v. First National Bank*, 25 L. Ed. 876, 101 U. S. 68:

> "The note was not endorsed to the Trust Company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been endorsed by the Cook County Bank, it may be that the Trust Company would hold it, unaffected by any equities between the maker and the payee. But instead of an endorsement, the President of the Cook County Bank merely guaranteed its payment, and handed it over with this guaranty to the Trust Company.* * *

"In no commercial sense is this an endorsement, and probably was not intended as such***

"And if it could be treated as an assignment of the note, it would not cut off the defense of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an endorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an endorsement creates a new and collateral contract."

The settlement with the pledgee having been shown, the duty of the appellee, as is laid down by the Supreme Court of Arizona in *Lentz v. Landers*, 21 Ariz. at p. 125, was to show

"(1) That he became the holder of the note before it was overdue and without notice that it had been previously dishonored, if such was the fact; (2) that he took it in good faith and for value; and (3) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

And of course, this requires that the pleading should allege these facts in order that the proof might be admitted.

There is no allegation in the amended complaint that the notes were transferred to the appellee by endorsement. The requirements constituting a holder in due course are defined by the negotiable instrument law of Arizona as follows:

"Sec. 2376. HOLDER IN DUE COURSE DE-

FINED. A holder in due course is a holder who has taken the instrument under the following conditions: That the instrument is complete and regular upon its face; that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; that he took it in good faith and for value, and that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." *Revised Code of Arizona*, 1928.

See also: *Arnett v. Reid*, 24 Ariz. 410; 210 Pac. 688.

Section 2381 of the Arizona Code provides:

"** When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. **"

See also: *Peoples National Bank v. Taylor*, 17 Ariz. 215, 149 Pac. 763.

The note being payable to the order of the payee, it could only be negotiated by the endorsement of the holder, completed by delivery. The endorsement must be on the instrument itself or upon a paper attached thereto. *Section 2362*, Revised Code of Arizona.

If an endorsement is qualified it constitutes the endorser a mere assignee of the title to the instrument.

The law is well defined that under such circumstances a plaintiff cannot recover. The rule is laid down by Chancellor Kent in the case of *Kane v. Blood-*

good, 11 A. D. 417, which was a case quite analogous to the instant case, as follows:

> "A pure plea of the statute is no bar where there are circumstances stated in the bill, which take the case out of it, as an offer to account, an acknowledgment of the debt, a promise to pay, or to do what was right and just, or a promise to pay when assets came to hand, unless the plea be accompanied with an averment or answer destroying the force of these circumstances: *Beames' Pleas, 169*, and the cases of *Pomfret v. Windsor*, 2 Ves. 485; *Andrews v. Brown*, Prec. in Ch. 385; *Bailie v. Sibbald*, 15 Ves. jun. 485; and *Galway v. Earl of Barrymore*, there cited; and see, also, 3 Atk. 70" (at p. 439).

The rule has also been stated in the case of *Western Union Telegraph Co. v. Yopst*, 3 L. R. A. (OS) 224, where the court says:

> "Where a plaintiff undertakes to plead and avoid a defense his complaint will be bad if he does not avoid the defense he assumes to state. If he states a valid defense without avoiding it, he destroys his cause of action. He is not bound to anticipate a defense; but if he undertakes to do so, and goes no further than to state a defense, he nullifies his complaint. *Locke v. Catlett*, 96 Ind. 291, 294; *Keepfer v. Force*, 86 Ind. 84; *Reynolds v. Copeland*, 71 Ind. 422." (At p. 227).

In the case of *Bowlus v. Phoenix Ins. Co.*, 20 L. R. A. (OS) 400, the court says:

> "It is well settled that while a party is not always bound to anticipate a defense it is often

proper for him to do so. A plaintiff may in many instances elect to set forth all the facts and submit the entire case upon questions of law. Our code system is closely akin to the equity practice, and, as is well known, it was proper under that practice to anticipate and avoid a defense. The decided cases recognize the rule that defenses may, in the proper cases, be anticipated, but they declare that where the pleader attempts to anticipate a defense he must effectively avoid it or his complaint will be bad. (Citing cases).

"The case before us is one in which the plaintiff could not with safety avoid showing the reason why the application did not correctly state the facts respecting the incumbrance since the nature of his cause of action and the provisions of his contract made such a statement necessary, not merely proper. The statements under immediate consideration being material and proper, were confessed, and, as they were not avoided, the first paragraph of the answer is bad. (Citing cases)."

See also: the U. S. Supreme Court decision in the case of *Mercantile Nat'l Bank v. Carpenter*, supra.

We submit, therefore, that under the authorities hereinbefore cited, appellant's demurrer should have been sustained.

SPECIFICATIONS OF ERROR NOS. III AND IV

(Assignment of Error No. III, Tr. 230-231, and Assignment of Error No. IV, Tr. 231-232)

The court erred in denying the motion of appellant

made at the close of appellee's case and the motion made at the conclusion of all of the evidence. These motions being identical, we will cover the argument on both here. The motion is as follows:

> "Mr. Charles Rawlins: We move the court to find for the defendant upon all of the facts, for the reason that plaintiff has wholly failed to establish his cause of action; *wholly failed to prove that the cause of action is not barred by the statute of limitations pled in our answer, and wholly failed to prove that the defendant ever signed any instrument in writing acknowledging the justness of the debt or that he would pay it,* at any time since the date of the note." (Tr. 210).

The court took the motion made by appellant at the close of appellee's case under consideration, saying that he would not rule upon it until all of the testimony was in. (Tr. 210). He also took the motion made by appellant at the close of all of the evidence under consideration (Tr. 57, 217). He denied both motions on the 15th day of September, 1934, and saved an exception for appellant-defendant (Tr. 58).

> The record discloses that appellee introduced into evidence the carbon copy of the instrument set up in his amended complaint, addressed to Hoval A. Smith, and dated January 1, 1927 (Plaintiff's Exhibit No. 4), a photostatic copy of which appears in the Transcript of Record at pages 233 to 235, inclusive. It is an incomplete instrument in that it shows no signature in the space left for that purpose, a blank space equivalent to four single-space typewritten lines have

been left for the written signature after the words "Yours very truly" and under said blank space the typewritten words "Cleve W. Van Dyke" appears (Tr. 235) as follows:

"Yours very truly

CLEVE W. VAN DYKE"

The original notes sued upon were not produced in court, nor was any proper foundation laid for the introduction of secondary evidence as to these notes.

We think clearly that the record discloses that appellant had the right to have the case dismissed for want of evidence to support any judgment in favor of appellee, and it also shows that appellee had made a complete settlement of the disputed claim with the then holder of the notes upon which this action is based.

(1) *The instrument of January 1, 1927, does not contain any acknowledgment of the justness of the claim as a subsisting obligation, nor express any willingness upon the part of appellant to pay the same.*

Since this has been fully argued under Specifications of Errors Nos. 1 and 2 herein at pages 44-81. We will not repeat same here, but will ask that the court refer thereto.

(2) *The parties placed a practical construction upon the instrument in question at the time it was dictated different from that set up in the*

amended complaint and now attempted to be placed thereon by appellee.

The instrument must be interpreted in the light of the circumstances under which it was written. These circumstances are stated by the plaintiff in his testimony as follows:

"I saw Cleve W. Van Dyke on or about January 1, 1927, in his office at Miami * * * and he called up Hoval Smith, and thereafter advised me that Hoval Smith, the last he heard was that he was in New York, but he would be back in Washington probably in three or four days, so Van Dyke wrote a letter to Hoval Smith in my presence; *he dictated the letter to his stenographer.* He gave me a copy of that. * * * *I saw it written, and Mr. Van Dyke, when she finished, took the copy and walked over to me and handed it to me.* (Tr. 174-175) (Italics ours).

* * *

"*That is a carbon copy of the letter dictated to the stenographer and written in my presence, and which Mr. Van Dyke handed to me.* (Italics ours).

(Referring to Plf. Ex. No. 4 for identification).

"That is absolutely the letter that he wrote at that time and gave me a copy. I went to Miami to see Mr. Van Dyke and see if I could get payment of those notes; that is how it happened that the defendant Van Dyke wrote this letter."

* * *

"Q. What was said about him writing this

letter, if anything by him to you, before writing it?"

"A. Why, he had told me that he supposed these notes were paid just the same as he did in that letter. He says 'Parker, I settled with the St. Ansgar Bank, Hoval Smith and I; Hoval transacted the deal, and all notes would be cleaned up', and he says 'I understood that those notes were cleaned up; that the bank still had them'. 'Well', I says 'you see they don't have them', so then after talking over our affairs, then he called up Hoval and got Mrs. Smith and found Hoval was out, and then he dictated that letter to get it off to Hoval, *and Mr. Van Dyke agreed with me he would not pay any of those notes at the St. Ansgar Bank until they took up my two notes.*" (Tr. 176-177) (Italics ours).

The theory of the amended complaint as expressed therein is that defendant "acknowledged the justness of the claim of plaintiff" (Tr. 12, 21) and in support of that theory the writing dated January 1, 1927, was set up in haec verba, and the case was tried on that theory. It will be noted from the testimony of the appellee, above quoted, that his interpretation of said letter was entirely different. He states that the letter was written to Hoval A. Smith because appellant had agreed with appellee that appellant would not take up the notes owing the St. Ansgar Bank by appellant and Smith, and being in the amount of $10,000.00 (Tr. 183), until that bank took up appellee's two notes which had been included in the

settlement (Tr. 176-177) made with the St. Ansgar Bank and Smith; and that

> "Mr. Van Dyke agreed with me that he would not pay any of those notes at the St. Ansgar Bank until they took up my two notes."

The appellant, too, upon the witness stand agrees with appellee's interpretation as to their understanding of the meaning of the writing and the purpose for which it was written. He says:

> "* * * and we got into the car and drove to Phoenix, and discussed the letter and the contents on the way over there, and after the discussion, we said we would not use it; the better way would be to have him meet Mr. Smith personally, and *so we arranged to telegraph him next day*, on the second, and Mr. Smith was in New York, and I did so telegraph, as I instructed my secretary to telegraph him to meet Mr. Parker in Chicago." (Tr. 198-199) (Italics ours).

> "Mr. Parker stated that he had been in discussion on the subject, and we visited along and discussed this thing, and we reached the point of where something should be done. I didn't know, just as he said, I didn't know those notes had not been taken up by the St. Ansgar Bank, but we made a settlement with the St. Ansgar Bank and assumed that those notes would be included in that situation, *and there was a payment to be made by us to the bank*, and he asked for a settlement from Mr. Smith along those lines, and so we, in our conversation, we were reaching out for an expression of our ideas, and we sat down

and called the stenographer—" (Tr. 190) (Italics ours).

Certainly the parties to the transaction best understood their intention and the meaning of the contents of the letter.

In the light of the circumstances surrounding that interview, namely that Mr. Parker had called upon Mr. Van Dyke in regard to the notes in question, and that Mr. Van Dyke had told Mr. Parker that he had settled for the notes with the St. Ansgar Bank with whom they were hypothicated to secure a loan of Mr. Parker's, and the demand then made upon Mr. Van Dyke by Mr. Parker, as appears from the letter itself, that Mr. Van Dyke should not pay any more money to the St. Ansgar Bank until the St. Ansgar Bank should pay Parker, there can be no doubt that the agreement reached between them was exactly as stated by Mr. Parker in his testimony quoted above.

An examination of the instrument itself bears out this interpretation, for this language is used in the letter:

> "I explained to him fully what my relationship to the bank was on these matters. I told him that we now have due and payable a note to them of $10,000.00. He has notified me that we must not make this payment to the bank until his matter is adjusted.
>
> "I am writing you to inform you of the situation. I request now that you feel obligated to Mr. Parker to fulfill my statement to him that we will not pay this note to the Bank of St. Ansgar until the matter is adjusted. **** Mr. Park-

er would have levied upon this payment that we were about to make to the Bank of St. Ansgar had I not stipulated to him as stated above.***

"It may be that Mr. Salisbury does not know about this stipulation and if he does not, you should apprise him of it and clarify it as soon as possible." (Tr. 16-17).

We think it clear that the rule laid down in the case of *Crunden-Martin Mfg. Co. v. Christy*, 22 Ariz. 254, 196 Pac. 454, governs the construction of this writing. We cite from that case as follows:

"He must have realized that the court and opposing counsel understood from his language that he was consenting to the terms so plainly stated, and the rule of law, as well as ethics, is that a party will be held to that meaning which he knew the other party to the contract supposed his words to bear if his language may be understood in more senses than one. In other words, whatever is expected by one party to a contract and known to be so expected by the other is to be deemed a part or condition of the contract."

The rule is stated with more fullness by the California Supreme Court in the case of *Mitau v. Roddan*, 84 Pac. 145, where the court says:

"We do not find it necessary, however, to enter into any consideration of the construction to be placed by us on the contract in this particular, because it appears from the findings of the court, which were unchallenged, that the parties themselves placed a practical construction on it, which is controlling.

"***** the construction placed upon it by both parties to it was that Mebius & Drescher had the right of inspection. This was a practical construction placed upon the contract by the parties themselves, which renders it immaterial to consider what might be the literal construction of its terms. Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as

the best evidence of what was intended by its provisions."

(3) *Neither the original, nor the carbon copy thereof was signed as required by statute, Section 2068, Supra. and the typewritten name thereon was not adopted by appellant, nor is there any proof of any intention on his part to adopt the same.*

An examination of the photostatic copy of the instrument dated January 1, 1927 (Plaintiff's Exhibit No. 4, Tr. 233-235), together with the evidence (Tr. 191) shows that it was never signed by the appellant, and discloses that it was merely a tentative letter dictated by appellant to his stenographer (Tr. 193) and by her returned to him for signature in the event he approved of it after it was written (Tr. 191). The evidence shows that he did not authorize her to sign it (Tr. 191) nor did he dictate the signature to her (Tr. 197).

The direct question was asked of appellee by his own counsel, as follows:

"Q. You heard the entire letter dictated?

A. I did.

Q. Did he dictate any signature to the stenographer?

A. I could not say." Tr. 189).

And the appellant testified as follows:

*"I did not tell the stenographer it ought to be signed * * * * I did not sign the original letter. I did not mail it to Hoval A. Smith, because when*

we went to Phoenix we agreed instead of taking this letter, sending this letter to Mr. Smith, having him go to St. Ansgar and discuss this affair, that it would be better to have him meet Mr. Parker in Chicago." (Tr. 191).

The fact that the original of the carbon copy was never signed nor mailed, and that instead thereof, there was, by agreement of the parties, a telegram substituted therefor, Tr. 198-199, is strongly indicative of an intention not to sign the letter, not to make it a completed instrument, and not to adopt the typewritten signature thereon.

There is no evidence in the record that after the same was dictated, it was ever read by appellant. That the instrument as handed to him is not of itself sufficient to constitute an adoption of the signature. Adoption is an affirmative act and there would have to be an intention to adopt the signature expressed in some form; nor is there any evidence in the record which might be construed as evidence of such an intention. Certainly the mere handing of a tentative instrument, the original of which was never signed nor mailed, should not be so construed. The instrument was not admissible in evidence under Sec. 2068, *Rev. Code of Arizona*, 1928, supra.

The Court will, we presume, take judicial notice of the modern practice of the business world in reference to dictated correspondence, namely the typing of the name of the person dictating below a space left for his signature, so that if the dictated instrument meets with his approval he will then sign the same in ink above the typewritten name. The reason

for this custom is two-fold: First, that there may be a record of the name of the person who dictated and signed the letter; and second, so that the correspondent receiving the original of the same may have no difficulty in ascertaining the name of the person by whom the original letter was signed.

We have not been able to find any case where the carbon copy of such a letter, with the name appearing in typewriting in the form that it does in plaintiff's Exhibit No. 4, has been held a sufficient signature to permit the admission of the instrument as a primary or original document for the purpose of avoiding the effect of the statute of frauds.

An instrument similar to that in the instant case was under consideration by the Fourth Circuit Court of Appeals in the case of *Richmond Stand. Steel Spike & Iron Co. v. Chesterfield Coal Co.*, 160 Fed. 832. There the contract was signed in typewriting: "The Chesterfield Coal Company", under which were two blank lines to be signed by the proper officers of the corporation, but who had never signed same. The question before the court was the sufficiency of the instrument to permit its admission for the purpose of avoiding the effect of the statute of frauds, and is stated by the court as follows:

> "The point primarily involved, and which if adverse to the plaintiff in error is decisive of the controversy, is whether a contract signed by one of the parties sought to be bound thereby, with the name of the other party written in type by the draftsman without authority at the time, can, by subsequent action of the party whose name

was signed in type, become by adoption a signed contract so as to be effectual to avoid the Virginia statute of frauds, which requires a contract not to be performed within a year to be in writing and signed by the contracting parties. The paper writing claimed by the plaintiff in error in this case to be a contract in compliance with the Virginia statute setting out the terms of the contract and signed by the parties was type written in the office of John S. Lear & Co., coal brokers, in Richmond, Va. The name of the Chesterfield Coal Company was typewritten at the time of drafting this paper at the bottom of the draft by the typewriter, and immediately, in this condition, sent to the plaintiff in error and properly signed in its name by the vice president and general manager of the company. The paper thus signed was then transmitted to the office of the defendant in error in New York, where it remained without further signature or signing by the defendant." (Page 833 of opinion).

The contention of the plaintiff was thus stated by the court:

"The contention of the plaintiff in this case is that although the Chesterfield Coal Company did not actually sign the contract in the first instance, and that the name of the Chesterfield Coal Company was placed there by the typewriter without authority, yet, after the plaintiff had executed the paper as a contract and the same had gone into the possession of the defendant and was held by it, the defendant had in the mean-

> time proceeded to supply the plaintiff with coal precisely as set out in the terms of the draft; that the defendant thus accepted the contract, recognized the signing as its act, became bound by the terms of the draft, and thereby adopted the name which had theretofore been typewritten as the name and signature of the said company; and that the typewritten draft then became a written contract signed by the parties so as to be effectual to avoid the Virginia statute of frauds." (p. 834).

Both the trial court and the Circuit Court of Appeals held that the contract had not been signed by the defendant or its duly authorized agent and, hence, under the statute of frauds, no recovery could be had thereon. The court said:

> "But the contract in this condition was only partially executed, and could not be treated as completed until the president or other properly authorized officer or agent of the defendant *had signed also in the blank left by the typewriter for that purpose.* It cannot therefore, in our opinion, be reasonably insisted that the contract was in writing and signed by the parties as required by the laws of the state of Virginia." (Italics ours) (p. 834).

The contention of the plaintiff in error in that case was that, although the signing and signature was unauthorized in the outset, there was a subsequent adoption which rendered the contract complete, but the court held that the facts and circumstances in connec-

tion with the alleged ontract were not sufficient to lay the foundation for that view.

It will be noted that the paper involved in that case had been transmitted to the office of the defendant in error in New York, where it remained without further signature or signing by the defendant. It will be further noted that there was correspondence between the parties subsequent to the filing of the paper by the defendant, and there were further circumstances found by the court as follows:

> "After the contract was signed by plaintiff and had been transmitted to New York with the name of the defendant company thereto written in type, there is evidence tending to show that the defendant company commenced to ship cargoes of coal to plaintiff in quantities and at prices as set out in the terms of the said draft, and thus continued until about July 21, 1902, when plaintiff complained to defendant that the coal being shipped was not of the character and quality required by the contract. Thereupon the defendant refused further to ship coal to plaintiff on the ground that it had made no contract with plaintiff as claimed." (p. 833).

It will be seen from that case, that the circumstances there proven to show the adoption or ratification of the instrument in question were much stronger than those proven in the instant case, and yet they were held insufficient.

We have traced this case through Shepherd's Citations, and these do not show that it has ever been reversed or modified.

(4) *There was no proof that appellee was the holder in due course or was even the owner and holder of the notes sued upon, either at the time the action was filed or at the time of the trial; and there was no presumption that the appellee was the owner and holder of the notes.*

We have in our argument under Specification of Errors Nos. 1 and 2, at pages 44-81 shown the insufficiency of the complaint to state a cause of action where the appropriate statute of limitations has been pleaded by demurrer as against the complaint, and we have heretofore under this specification pointed out the practical construction placed upon the instrument by the parties to this action showing that neither the appellant nor appellee interpreted the instrument to be an expression of a willingness to pay the claim sued upon nor to consider it an acknowledgment of the justness of the claim as a subsisting obligation.

We now desire to call the court's attention to the fact that neither in the instrument itself nor in the evidence in the case was it established that the appellee was the owner and holder of the notes much less was he a bona fide holder for value. This being an action at law and in addition to the special defenses pleaded by appellant-defendant, a general demurrer having been pleaded, it was incumbent upon the plaintiff below to prove his case by competent evidence, and included in such proof there would have to be proof that he was the owner and holder of the instrument sued upon; that he had acquired same by endorsement before maturity in the usual course of

business, and that he had given value received therefor. In appellee's testimony at the trial he testified that he had borrowed money on the notes from the St. Ansgar Bank of Brush, Lubiens & Annis (Tr. 147); that he received them back later from the bank but does not disclose when he received them. They were also seen by the witness Carson P. Parker when they were forwarded to the St. Ansgar Bank of Brush, Lubiens & Annis and this witness testified that they remained at the bank for a period of more than a year (Tr. 157), and Annie E. Parker, wife of appellee testifies that she saw the notes when they were sent to the bank at St. Ansgar and saw them again when they were returned from the St. Ansgar Bank (Tr. 159).

The uncontradicted evidence shows that while these notes were in the possession of the bank as pledgee that a settlement was made of them by Mr. Smith and appellant.

It was after this settlement that the notes were re-returned to the appellee (Tr. 15). No demand was made upon the appellant for the payment of these notes subsequent to the date of settlement thereof until January 1, 1927, more than seven years after the last of them became due. (Tr. 15). The inference to be drawn from this conduct of appellee and the bank is clear that each of them regarded the notes as having been settled as is expressed in the writing dated January 1, 1927, which was dictated in the presence of appellee who heard every word of it as it was dictated. Neither in the pleadings of the appellee, nor in the testimony or other evidence in the

case was any attempt made to prove that this settlement was not made as claimed by the appellant, nor was there any allegation in the complaint showing that the appellee was a holder in due course, an allegation, we think, which was necessary because of the fact that his own complaint disclosed a settlement made. But if it could be said that it was not necessary to plead that appellee was an owner in due course, certainly the burden of proof was upon him to prove this after it had been shown by the evidence in the case that the settlement had been made and that therefore when the bank transferred the notes to him it did not have good title to them, and that he took them subject to all the equities in favor of the makers thereof. Therefore we say that there was first, a failure of proof as to the plaintiff-appellee being a holder in due course, or a holder at all, and second, that it affirmatively appears that the notes were settled while in the hands of the pledgee, and third, that the instrument in writing dated January 1, 1927, disclosing these facts established its insufficiency to avoid the bar of the statute of limitations pleaded, and the facts set up in the pleading are proven by competent evidence as appears from the record. The authorities upon these points will be found cited under our argument under Specification of Errors Nos. 1 and 2 herein pages 44-81.

There is another feature of the evidence that appears to us to have great significance. The appellee was a witness on his own behalf. Three times he was called to the stand by his own attorneys. Not once did he testify that he was the owner or holder of the

notes. Not once did he testify that they had been endorsed over to him before maturity or otherwise, or that he did not know that a settlement of them had been made with the pledgee nor to any of the circumstances under which they came into his possession again after he had pledged them to the bank.

Appellee was represented by counsel of the highest standing—able, astute, experienced lawyers, *yet not one question did they direct to him* for the purpose of ascertaining if he was the owner and holder of the notes, or had acquired them from the bank under circumstances that would make him a holder in due course.

The evidence is insufficient to establish any basic fact upon which a presumption could be drawn that the appellee was the owner and holder of the notes at the time of the filing of the action, or at the time of the trial. Stating it in the form most favorable to appellee, it discloses that the notes were in his possession on January 1, 1927, but there is no testimony to the effect that he was the owner and holder thereof at that time. If possession of the notes at that time was sufficient to justify the presumption that he was then the owner and holder thereof, it would not justify a presumption based upon that presumption that he was at the time of the trial owner and holder of the notes sued upon, much less the presumption that he was a holder in due course for value before maturity and obtained them by endorsement in the regular course of business without notice of the equity of the appellant. This would be piling presumption upon presumption, contrary to all of the authorities.

In the case of *Musson, et al v. Lake*, 11 L. Ed. 967, 4 How. 262, the question arose as to the affect of inferior evidence and a presumption founded upon a presumption, and the proposition was made that the presentment of a protest being made by a public officer "the presumption of the law is, that they do their duty; and therefore, if the protest were defective, and liable to the objection urged against it, this presumption of law would cover all such defects." And the court in answering this contention says: "This is substituting presumption for proof, in violation of all the rules of evidence."

In the case of *United States v. Ross*, 23 L. Ed. 707, 92 U. S. 281, it was also attempted to establish a presumption that a public officer had done his duty and from that draw another presumption, but the court says:

> "Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

The court also says in speaking of the inference sought to be drawn from the facts in that case:

> "They are not legitimate inferences, even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved,

and not themselves presumed. (Citing authorities)"

There being no testimony as to the basic fact of ownership at the time the notes were presented to appellant, presumption could not be piled upon presumption for the purpose of showing that appellee was the holder for value and in due course at the time of the trial.

Manning v. Mutual Life Ins. Co., 25 L. Ed. 761, 100 U. S. 693.

United States v. Carr, 33 L. Ed. 483; 132 U. S. 644.

United States v. Ross, supra.

Musson, et al v. Lake, supra.

(5) *The depositions introduced furnish no foundation for the introduction of secondary evidence.*

We are covering the argument on this point under Specification of Errors No. VI and VII herein, at pages 105-106 so will not discuss this at this point, but will ask the court to consider the argument under the specifications referred to.

(6) *The evidence shows that the notes had been pledged to the St. Ansgar Bank by appellee, and there is no evidence that the bank had not been paid or that it was not still the owner and holder of them, and the evidence affirmatively shows that they were paid to the bank.*

This proposition is clearly established by the record as we have heretofore pointed out, at pages 96-97 of our brief.

(7) *Appellee failed to prove any endorsement of said notes to him from the St. Ansgar Bank.*

The original notes were not introduced into evidence, and the copies as set up in the amended complaint did not show nor was there any allegation in the amended complaint of any endorsement other than the purported endorsement of a payment thereon. If they were true copies then there was no endorsement of the notes from the St. Ansgar Bank to appellee, but appellee's testimony clearly establishes that the bank became the pledgee of the notes. (Tr. 147).

Therefore in order to maintain this action they would have to be endorsed over to appellee by the bank in the regular course of business before maturity and without notice that they had been dishonored; otherwise the defense of a settlement with the bank is good as against appellee. *Central Trust Co. v. First National Bank*, 25 L. Ed. 876; 101 U. S. 68.

(8) *Appellee failed to prove any facts which would avoid the confessions he made in his complaint.*

A reference to the record will disclose that there was not even an attempt made to prove that the settlement with the bank had not been made exactly as was contended in the writing of January 1, 1927, and as was shown by the testimony of appellee, as hereinbefore stated (Brief, pages 85-86 and it was incumbent upon him to so prove (Brief, pages 75-81)

(9) *Appellee is charged with knowledge of contents of said writing.*

Appellee had carefully preserved the carbon copy of the writing from January 1, 1927, to the date of the trial, on the 2nd day of June, 1933,—a period of six and a half years. During that time he had full opportunity to investigate and refute the defense that was set up in that letter. From an early date in 1931 to the time of the trial it was in the hands of appellee's attorneys,—able and competent men—with every opportunity to ascertain the facts and to obtain evidence to refute the statements contained in said instrument. No attempt was made by the introduction of any evidence to refute the contention of appellant, which contention was sustained by the uncontradicted evidence.

(10) *Appellee having appeared on witness stand cannot rely upon inferior testimony to establish facts not testified to by him.*

Plaintiff had a peculiar knowledge of the transactions between himself and the Bank of St. Ansgar. He himself testified to the pledge of the notes (Tr. 147), but not having testified to the manner in which they came into his possession subsequent to the pledge, he cannot rely upon inferior testimony to establish these facts, for the production of the inferior testimony when he had an opportunity to give better evidence creates the presumption that the evidence which he did not give, would be more favorable to the appellant than that which he did introduce. This proposition is thoroughly covered by the following two cases from the Supreme Court of the United States:

Runkle v. Burnham, 38 L. Ed. 694; 153 U. S. 216.

Kirby v. Tallmadge, 40 L. Ed. 463; 160 U. S. 379.

Musson v. Lake, supra.

SPECIFICATION OF ERROR NO. V

(Assignment of Error No. V., Tr. 232-237)

The court erred in admitting in evidence in behalf of plaintiff-appellee Plaintiff's Exhibit No. 4 (Tr. 233-235), over the objection and exception of defendant-appellant.

As heretofore stated the original instrument of the writing of January 1, 1927, was not produced, but a carbon copy there was admitted in evidence as an original document, which was unsigned. There was no proof that the original had ever been signed, but on the contrary the evidence showed that it was never signed and never mailed. (Brief, p. 90-91).

Since we have covered this matter in this brief, we will not re-iterate same here, but will ask that the Court consider the following memorandum of references to the argument in this brief on this point, as if the same were set out in full here.

The instrument was not admissible in evidence because it was not signed by the appellant as required by the statutes of Arizona. (Brief, pages 90-95).

The instrument was not admissible in evidence because the law of the forum requires that such an instrument shall contain an admission of the justness of the claim as a subsisting obligation and an expression of a willingness to pay. (Brief, pages 69-75).

The instrument was not admissible in evidence be-

cause the law of the forum governs in all matters of limitation and evidence. (Brief, pages 48-54)

SPECIFICATIONS OF ERROR NOS. VI AND VII

(Assignment of Error No. VI, Tr. 237-238 and Assignment of Error No. VII, Tr. 238-239)

The court erred in permitting the introduction in evidence of that portion of the amended complaint which set up the copies of the notes sued upon.

The original notes were not introduced in evidence. That portion of the amended complaint setting up said notes was admitted as secondary evidence of the contents of the original notes.

No sufficient foundation was laid for the introduction of this secondary evidence as to the contents of said notes. Depositions were introduced into evidence (Tr. 148-162), but neither these depositions, nor any other evidence, show that deponents ever saw the complaint which is the basis of this action. The most that can be said, is that they saw a purported copy of the complaint, which is unidentified, and there is no testimony that deponents ever saw the original complaint, or a certified copy thereof, or a compared copy thereof. Nor is there any evidence that deponents ever saw the notes sued upon. The most that can be said is that they saw certain notes copies of which were set up in the unidentified complaint. Their testimony consequently is purest hearsay.

Furthermore there was no sufficient showing of a search for said instruments as laying a foundation for the introduction of the copies of the notes.

The testimony indicates that after the death of Mr. Foster, the original attorney for appellee in this matter, the notes passed into the hands of his surviving wife (Tr. 165-170). Her deposition was not taken, nor is there in the record any evidence that she was ever called upon to produce the notes. The presumption, therefore, is that the original notes are still in her possession.

It was vital to appellant to have the original notes produced. The confessions set up in the amended complaint show that a transfer of these notes was made to the St. Ansger Bank and a settlement made with said bank by appellant while the notes were in the possession of the bank—a good defense to appellee's action which was not avoided by any allegation of the complaint or any evidence in the record. The original notes would show the endorsement back from the bank after Parker had pledged them, if they were so endorsed; and if such endorsement did not appear on the notes, appellee was not a holder in due course and could not recover. There was a defective title in plaintiff which could only be overcome by allegations and evidence showing him to be a holder in due course, obtaining the notes from the bank by means of an endorsement in due course prior to their dishonor, and for an adequate consideration.

SPECIFICATION OF ERROR NO. VIII

(Assignment of Error No. VIII, Tr. 240-247)

The court erred in finding judgment for plaintiff-appellee herein, in that the judgment of the court is not sustained by the Special Findings of Fact.

The Special Findings of Fact taken as a whole do not sustain the judgment of the court.

Finding of Fact No. 5 (Tr. 103-108) and Finding of Fact No. 12 (Tr. 111) are to the effect that appellant acknowledged the justness of the claim upon said promissory notes in the written instrument of January 1, 1927. This portion of said findings is nullified by reason of the fact that the written instrument is set up in haec verba (Tr. 103-108) and the instrument shows upon its face that there was no acknowledgment of the justness of the claim, and even if there was an acknowledgment, it would still be insufficient to toll the statute of limitations as it does not acknowledge the claim as a subsisting obligation or express a willingness to pay the same. We have argued this fully on pages 48-75 of our brief, and will therefor not repeat same.

As we have pointed out in our brief, at pages 48 - 54, the instrument must be interpreted according to the law of the forum, and under the law of the forum the instrument in question is not a sufficient acknowledgment.

Furthermore, it will be noted from the record, that upon the objection of appellant to Findings of Fact Nos. 5 and 12 in the Proposed Findings of Fact (Tr. 59-72) the court ordered that the words "and expressed a willingness to pay the same" should be stricken (Tr. 100) and that the words "executed at Miami, Arizona," be added after the word "instrument" in line four thereof (Tr. 100) in the Special Findings of Fact No. 5 (Tr. 103-108) and No. 12 (Tr. 111). From this it is clear that the finding of

the court is equivalent to a finding that appellant did not express a willingness to pay.

The court in its Findings of Fact No. 4 (Tr. 103) and 11 (Tr. 111) merely found that appellee was the owner and holder of the notes sued upon. This is not equivalent to a finding that he was a holder thereof in due course. Under the decision of the Supreme Court of the United States such a finding is insufficient under the issues presented. Upon this point we refer to our argument at pages 108-109 herein.

If plaintiff's amended complaint stated a cause of action at all, it would have to rest upon that portion of paragraph IX of the first cause of action (Tr. 19) and paragraph VIII of the second cause of action (Tr. 22) that plaintiff was the owner and holder of said notes. The issue was directly made thereon by defendant-appellant by his general denial in his Amended Answer, as follows:

> "Defendant denies each and every allegation, matter and thing contained in plaintiff's complaint" (Par. II, Tr. 47).

This was a sufficient answer to raise the issue under the rule laid down by the Supreme Court of the United States in *Smith v. Sac County* (Iowa), 20 L. Ed. 102; 78 U. S. 139 where under a like situation it was held that a like finding of fact was insufficient to sustain a judgment for the plaintiff and in that case a judgment was rendered for the defendant. The court in holding for defendant (appellee) in that case used the following language:

> "It must be taken, then, that plaintiff did not show that he was a holder for value. There is

> neither finding nor evidence that he gave value, and the statement that he became the holder by transfer before maturity, does not imply that he was a purchaser in any sense or received them on any consideration whatever."

This decision of the Supreme Court of the United States has been followed in many subsequent cases.

It must be taken then that appellee herein did not show that he was a holder for value. There is no finding that he gave value or paid any consideration therefor.

Findings of Fact No. 6 (Tr. 109) and No. 13 (Tr. 111) are not sufficient to establish that the appellant adopted his name written in typewriting at the foot of said instrument as his signature and did thereby sign the same, for the reason that said findings of fact purport to state the evidentiary facts upon which this conclusion is based, and these are insufficient to establish such conclusion, in that as a whole these evidentiary facts do not disclose by word or act any intention on the part of appellant to adopt the typewritten name as his signature.

We submit therefore, that the Court's Special Findings of Fact are insufficient to sustain its judgment.

SPECIFICATIONS OF ERROR NO. IX AND X

(Assignment of Error No. IX, Tr. 247, and Assignment of Error No. X, Tr. 248)

The court erred in making its Finding of Fact No. 4 (Tr. 103) and Finding of Fact No. 11 (Tr. 111), and particularly that portion of said findings that

the plaintiff was and is still the owner and holder of the said notes.

These findings are not supported by any evidence whatsoever. We have argued this at length at pages 75-81 of our brief, and will not repeat same here, but adopt the argument there stated.

SPECIFICATIONS OF ERROR NO. XI

(Assignment of Error No. XI, Tr. 248-249)

The court erred in making its Finding of Fact No. 5 that after the maturity of said note the defendant-appellant acknowledged the justness of the claim of plaintiff in the written instrument of January 1, 1927. That instrument is entirely insufficient to sustain this finding. We have heretofore presented our argument as to the insufficiency of the instrument at pages 48-75 herein.

SPECIFICATIONS OF ERRORS NO. XII AND XIII

(Assignment of Error No. XII, Tr. 249-250, and Assignment of Error No. XIII, Tr. 250)

The court erred in making its Finding of Fact No. 6 (Tr. 108-109) and Finding of Fact No. XIII (Tr. 111-112) that the defendant-appellant intended to adopt and did adopt his name written in typewriting at the foot of said instrument as his signature, and did thereby sign the same.

There is no evidence to sustain such findings of fact. On pages 90-95 hereof we have argued this fully, and we ask the Court to consider our argument thereon the same as if set up here again.

SPECIFICATION OF ERROR NO. XIV

(Assignment of Error No. XIV, Tr. 250)

The court errer in making its Finding of Fact No. 16 (Tr. 112) that the said promissory notes were lost prior to the commencement of the suit, and that the same could not be found after diligent search and inquiry, but that the evidence establishes the form and language of said notes.

We submit that there is no evidence whatsoever to support this finding. We have covered this in our brief at pages 105-106 herein.

SPECIFICATIONS OF ERROR NO. XV

(Assignment of Error No. XV, Tr. 251)

The court erred in its Conclusion of Law No. 1 (Tr. 113) that the said promissory notes are not, nor is either of them, barred by the statute of limitations of the state of Iowa or the State of Arizona, but that the same are now valid and subsisting obligations.

The statutes of Iowa have no extra-territorial effect, and the causes of action are barred by the statute of limitations of the State of Arizona, which has heretofore been fully covered in this brief at pages 48-75 and we will not repeat same here. But we do wish to point out here that the court erroneously assumed that the law of Iowa governed this action. The court evidently overlooked the rule laid down by the Supreme Court of the United States that the law of the forum governs in matters of limitation and evidence.

SPECIFICATION OF ERROR NO. XVI

(Assignment of Error No. XVI, Tr. 251)

The court erred in its Conclusion of Law No. 2 (Tr. 113) to the effect that the instrument dated January 1, 1927, is a sufficient instrument under the statutes of Iowa to arrest the running of the statute of limitations and to start the period of limitations running anew under the law of the state of Iowa.

We think the ruling is erroneous in that the law of the state of Iowa has no extra territorial effect, and that the sufficiency of the instrument is to be determined by the statutes of Arizona; particularly by Sec. 2068, Revised Code Arizona, 1928. This is particularly true of an instrument executed within this state. We know of no decision holding to the contrary.

As we have presented our authorities on this question at pages 48-75 herein, we will not here repeat them.

SPECIFICATION OF ERROR NO XVII

(Assignment of Error No. XVII, Tr. 252)

The court erred in its Conclusion of Law No. 2 (Tr. 113) that the instrument dated January 1st, 1927, is a sufficient memorandum in writing to arrest the running of the statute of limitations and start the period of limitations anew under the laws of the State of Arizona.

We have heretofore at pages 54-75 covered the point that this instrument was not a sufficient memorandum in writing to arrest the running of the

statutes of limitations and start the period of limitations anew under the laws of the State of Arizona. Furthermore, as we have heretofore pointed out, at page 107 herein, the court expressly deleted the words "expressed a willingness to pay" from the proposed findings of fact, and this is a necessary requirement to toll the statute.

SPECIFICATION OF ERROR NO XVIII

(Assignment of Error No. XVIII, Tr. 252-253)

The court erred in its Conclusion of Law No. 4, (Tr. 113-114) that the absence of the defendant from the State of Arizona prevented the operation of the statute of limitations during the period of such absences, and that neither of said notes was barred by limitations.

We submit that this has no bearing upon the issues in the case. There is no evidence, whatsoever, that the appellant was absent from the state, other than for a few months in the year 1927 (Tr. 139). As this claim had been barred for many years prior to that time, his absence during that period could have no effect upon the operation of the statute. The court's conclusion of law is based upon the erroneous assumption that the case is governed by the statutes of limitations of the state of Iowa.

SPECIFICATION OF ERROR NO. XIX

(Assignment of Error No. XIX, Tr. 153)

The court erred in its Conclusion of Law No. 5 (Tr. 114) that plaintiff was entitled to judgment as set forth therein.

We submit that the judgment is contrary to the laws and statutes of the state of Arizona; is contrary to the evidence in the case, and is neither supported by the findings of fact made by the court, nor by the evidence in the case. As we have thoroughly argued all the points upon which this conclusion of law is based, we hereby adopt our previous argument, and respectfully request that the court consider the preceding argument as applicable to this assignment of error.

CONCLUSION

In conclusion, we submit that appellant is entitled to have the judgment of the trial court reversed and a judgment rendered by this Honorable Court in favor of appellant, or a mandate to the United States District Court of Arizona to enter a judgment on behalf of defendant, for the following reasons:

(a) Because it affirmatively appears from the pleadings in the cause that the alleged causes of action in appellee's amended complaint were barred by the statute of limitations of the State of Arizona; and that the writing dated January 1, 1927, and incorporated in haec verba in appellee's complaint, is not a sufficient instrument under the statutes of Arizona to arrest the running of the statute of limitations as pleaded by appellant in his demurrer.

(b) For the reason that the trial court erred in denying the appellant's motion for judgment made at the end of the testimony in behalf of plaintiff, and renewed by appellant at the close of all the evidence; and because there was no evidence to sustain a judg-

ment for the plaintiff upon either cause of action stated in his amended complaint.

(c) For the reason that it affirmatively appeared from the evidence that plaintiff's alleged causes of action as set up in his amended complaint, were barred by the provisions of the statute of limitations of the State of Arizona, as contained in Subdivision 3, Section 2061, of the 1928 civil code, which defense was set up by defendant-appellant both in his demurrers and in his answer to the merit of plaintiff's amended complaint.

(d) And for the further reason that the writing dated January 1, 1927, was not a sufficient compliance with Section 2068 of the 1928 Civil Code of Arizona to arrest the running of the statute of limitations pleaded by appellant, even if the same were signed by appellant.

(e) For the reason that the uncontradicted evidence shows conclusively that the writing dated January 1, 1927, was never signed by appellant, nor were the words, "CLEVE W. VAN DYKE", appearing in typewriting below the blank space left after the words "Yours very truly", ever intended to be adopted by appellant; and they were never adopted by appellant as his signature. Therefore, Section 2068 of the 1928 Civil Code of Arizona, being a statute of frauds, the signature is insufficient to entitle the writing to be admitted in evidence.

(f) For the reason that there was no evidence

that appellee was the owner and holder of the notes sued on in plaintiff's amended complaint, at the time that the action was brought, or at the time that the judgment was rendered therein; and that there was no proof or any evidence from which such a presumption could be drawn.

(g) For the reason that the evidence discloses that the parties put a practical construction upon the writing dated January 1, 1927, which was wholly at variance with the theory of plaintiff's amended complaint, and with the theory upon which the trial court made its findings of fact and rendered its judgment; and that said practical construction was binding upon the parties to this action.

(h) For the reason that it affirmatively appears from the evidence that appellee was not a holder in due course of the notes sued upon, and that appellant had a valid defense to the amended complaint, based upon fraud in the inception of the contract which was the consideration of the notes, and upon the accord and satisfaction in settlement of the disputed liability thereon with the then holder of the notes, who did not transfer these notes to appellee until after they had been dishonored; and for that reason, appellee was charged with full knowledge that there was a valid defense existing against them at the time that he obtained possession of them from the Lubiens, etc. Bank of St. Ansgar.

(i) For the reason that this defense appears in the writing dated January 1, 1927, and is wholly in-

consistent with the claim of appellee that appellant acknowledged the justness of the claim sued upon, or expressed any willingness to pay the same.

Respectfully submitted,

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